MITIGATION OF THE DAMAGES, AN ANALYTICAL VIEW OF ARTICLE 77 OF CISG IN COMPARISON WITH UNIDROIT PRINCIPLES

A Dissertation Submitted to the Business Law School,

The University of Huddersfield, for the Award of the

Degree of (Master of Laws) LLM

BY

Miss. Asmaa Chaudhry

25th August, 2011

University of
HUDDERSFIELD

LLM in Commercial Law **2010-2011**

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DECELARATION

I **Miss Asmaa Chaudhry** acknowledge that the material contained in this dissertation is completely result of my own investigation, unless referenced in the text as a specific source and included in the bibliography. It has not been used before in any other submission for an academic award and there is full attribution of the work of some other authors. The written word count for this dissertation is **17,440,** excluded from headings, quotations and bibliography.

Miss. Asmaa Chaudhry

Supervised by

Dr. George Ndi

DEDICATION

I dedicate this project to my wonderful family. Particularly to my understanding and loving parents and grandparents (late) who provided me endless love, support and motivation through the duration of my studies and without their prayers it was impossible for me to accomplish it.

Eventually, I dedicate this project to M. Sohail, my precious elder brother and Anil Goswami, my uncle who gave several friendly inputs, philosophical turns and guided all through.

In the end, once again special love and big thanks to my family & fellows, near and far who have been supportive, encouraging & giving me prompt sound advice so far but they wish to remain anonymous. Special thanks to them & appreciation for talking off the record.

ACKNOWLEDGEMENT

I am grateful to the creator of the world for boosting me up in completing this project. I would like to thank all those who helped me to produce this dissertation possible. Firstly my deepest gratitude is towards my supervisor Mr. Dr. George Ndi, whose guidance was the force behind.

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Chapter No. 1

INTRODUCTION AND BACKGROUND

INTRODUCTION

Usually parties recognized as a vendee and a vendor enters into a contract in order to conduct their business in the international Sale of Goods. The CISG provides many rights, duties and remedies to both the buyer and the seller regarding the breach of the contract. Therefore, in the breach of contract any party can adopt for the remedies supplied in the CISG. The most significant duty in case of breach is the mitigation of damages. The concept of the rule of the mitigation loss is that when the aggrieved party reasonably nullified the loss then they have capable to recover the damages in the regard of the loss. The Convention enforces duties on the party who has in possession of goods normally the buyer to have such measures to protect the losses of the party in breach which is the vendor. In this direction under the CISG Article 77, postulates the aggrieved party to mitigate the loss and it is simply connected with the damages.

The primary aim of the research is to inquire the concerned issues regarding the mitigation of the damages. The convention is formulated to elevate the world trade by rendering a platform to the international business community for the more beneficial apprehension between them. The research would focus the provision of the CISG which supplies the mitigation of the damages and analytical view of article 77 with a comparison of the UNIDROIT Principles. All such matters would be discussed thoroughly in the dissertation. In this research, the author would like to submit a systematic and detailed depth of the articles relating to the mitigation of the damages and analytical view of article 77. In addition would like to concentrate on concern issues relating to article 77 of the CISG.

1.1 Back Ground:-

The drafting history of the Convention brings positive views to its rules and damages, and these rules will be represented. The Convention will be discussed the reason of negotiation over fifty years[1]. Through getting the agreement by an international sales law preceded has been divided into two levels. In 1928 at the Sixth Session of the Hague Conference on Private International Law, the first level has been begun[2]. In the 1920s and 1930s, the countries who took a part in this endeavour have been come from Europe[3].

After the World War II, the second level of the Convention's drafting history has been begun. There are many groups of countries which are developed and undeveloped, socialist and capitalist, colonized and colonizing have been bestowed, and had concerns about the final draft of the Convention that what would become[4]. In 1964, when the conference was held by twenty-eight countries at the Hague Convention which has been adopted,

"(1) the Convention on the Formation of Contract and

(2) the Convention on the Sales Contract"[5].

Negotiations have been concentrated on these two Conventions, it has been guided to approval by the United Nations Commission on International Trade Law

[1] Jeffrey S. S., *Measuring Damages under the United Nations Convention on the International Sale of Goods,* 50 *Ohio State Law Journal* (1989) 737-752 Also available on internet at http://www.cisg.law.pace.edu/cisg/biblio/sutton.html (accessed on 20 February 2011)

[2] *Honnold. J. H., Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International, The Hague (1999), Also available on internet at: http://www.cisg.law.pace.edu/cisg/biblio/honnold.html*

[3] *Jeffrey S. S., Measuring Damages under the United Nations Convention on the International Sale of Goods, 50 Ohio State Law Journal (1989) 737-752 Also available on internet at http://www.cisg.law.pace.edu/cisg/biblio/sutton.html (accessed on 20 February 2011)*

[4] *Honnold. J. H., Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International, The Hague (1999), Also available on internet at: http://www.cisg.law.pace.edu/cisg/biblio/honnold.html*

[5] *Ibid*

(UNCITRAL) in 1978 with the regard of a draft sales Convention. It has been eventually acquired in 1980 in Vienna and then came into force on Jauary1, 1988[6].

When drafting of the CISG was constituted, the UNCITRAL body was liable for that. It has been comprised of nine different states from Africa, seven from Asia, five from Eastern Europe, six from Latin America, and nine from Western Europe and others United States. The concluding draft of the Convention speculates the variety of legal customs, and world's, "*balance of influence and need".* Whilst the variety of legal customs are very much important to develop a genuinely international sales law, the Convention comprises many vital regions of understanding which is to be indicated to an inadequacy of the agreement[7].

1.2 Purpose and Objectives of the Research:-

The main purpose of the author of the proposed research is to investigate the problems which pertain to the mitigation of damages under CISG in International trade and business.

The analysis mitigation provisions in the Convention have been analysed particularly with reference to the contemporary matters which are relevant to the trade and business in international market level. Secondly, the Article 77 of the CISG has been compared with the mitigation provisions present in UNIDRIOT Principles with the objective discover the resolutions regarding the problems in this respect.

The objects of the research have been obtained through the particular analysis of Article 77 of CISG. Thereafter, bear in mind the objects of Article 77, the duties and responsibilities of both the buyer and the seller has been discussed regarding the breach of contract and the measures taken by parties in the situation of doing so. The object of the dissertation has been achieved through the above mentioned sketch evaluated with the provisions of mitigation of damages in UNIDRIOT

[6] *Jeffrey S. S., Measuring Damages under the United Nations Convention on the International Sale of Goods, 50 Ohio State Law Journal (1989) 737-752 Also available on internet at http://www.cisg.law.pace.edu/cisg/biblio/sutton.html*

[7] *Ibid*

Principles. The proposed subject of the dissertation has been critically evaluated in the discussion.

1.3 Methodology and Review of the Literature:-

During the literature review of the proposed dissertation topic, the main aim of the author was to investigate the problems concerning the mitigation of damages under CISG in international trade and business. Therefore, to identify these concern issues that the author has carried out this research.

Through the literature review, it has covered the area of topic by relevant handbook sections, journal articles and references. However, the cases, journal articles studies and were identified by the literature review. The research was conducted by the mixed method related to the subject. The primary source of research is the handbooks present in the library and also available on internet comprising the material with the respect of research topic containing of International trade law and commentaries on trade law as well CISG and UNIDRIOT Principles. The author has also got the assistance of other literature and reference material relating to the topic of the dissertation. Beside the Huddersfield University library, the author approached The Sheffield Hallam University library for assembling of research material. In the contemporary world of electronics the internet is a rich source of information so therefore, the author had some detailed research on the electronic library, where the relevant material regarding the history and application of the Convention, case laws and official records are available. The author consulted in the electronic library which is the official website of the 'PACE law school' is an institute of international commercial law, where the relevant material is available for the proposed topic of a dissertation which is reliable, authenticate because of contains the 9,000 bibliographical citations, over 2,600 cases and over 1,400 full texts of various commentaries, treatises and books on the CISG and related subjects. The author found it very useful, legitimate and authenticates massive material regarding to the proposed research. However, electronic material has been consulted to authenticate the research and have conducted to accomplish the proposed dissertation. The

research has been conducted through the analysis and comparative study of the material used for the dissertation.

1.4 Application of the Convention:-

It is described in Article1 (1) that this Convention apply to all Contracts for the Sale of Goods between the parties whose business sites are situated in a various Countries.

It also explains that it has applied simply if the countries are contracting countries or when the rule of private International Law guided to the application of the and contracting of countries. As the United States of America did not apply the Article 1 (1) (b) so the convention will not apply to United States of America's sale's contract when International Private Rules show the way to the application of a contracting country's own law.

In Article 1 (2) if they ignore this concept that the parties having their offices of business in various countries, between of them any one reason could be applicable, at the conducting of the contract, or data revealed by the parties at any stage before or closing the contract. It further explains in the Article 1 (3) that there is no any racial discrimination rises up such as Nationality or civil and commercial of the parties, during the application of the Conventions. The Convention except many kinds of International Sale Contracts which are as; personal belongings, family or household usages, goods by auctions, of stock, shares, investment securities, negotiable instruments or money. Furthermore, it excludes from aircraft, hovercraft, of ship vessel and of electricity etc.

1.5 General Drafting Considerations:-

The Convention's describes the liberty of the Contract and the way of agreement, which shows the responsible countless attorneys chance to draft unfavorable provisions or could be admitted those segments of the Convention in supporting the client. The first question drafting attorney confronts is whether to delete the

Convention entirely from the Contract[8]. Most of the American's attorneys usually adopt to make the State's Law, simply the uniform Commercial code, the Law of the Contract if for there is no cause then the anticipated in surely provides.

However, a cautious and sensible attorney gives countless chances to draft with unsuitable requirements in legal document to add points supporting the individual or the client. Firstly, the lawyer (attorney) has to think whether they have to except the Convention from the Contract. It might be supposed that most of the American lawyers wish to make their state law a Uniform Commercial Code, as it will have the ability to anticipate and would be certain. Those attorneys who cannot modify the law, the Convention itself provides a possible origin of the law of contract[9]. In such circumstances, where the governing law is not suitable the agreement, can adopt the way where the Convention can do provide the resolution which could be provided simple way depending upon the law of differences or on foreign sales laws. In such situations the attorney needs to understand the type of the Convention and how it would be understood. *Inherent in the Herculean*, in this difficult task the drafters of the Convention have to combine an impressive display of the legal customs. They have to frame meaningful sentences which would also, are not insulting to any negotiator. The drafters have to adjust varied laws in such a way that it should easily cover those points which are not agreeable. The drafting attorney who is framing the policies should have the knowledge of "*illusion of certainty*" and should take into consideration the hopes of the client. This word of caution is necessary, though some commentators praise highly the convention as being same as Article 2 of the Uniform Commercial Code.

However, courts would be representing the Convention which could be continued to view. If the case is related to the contract, which is under the Convention, then Federal courts in the United States had no chance to deliberate the matter. The United Nations had not developed an international court to listen any confliction

[8] *If not excluded, the Convention governs the contract under article 1. CISG*

[9] *Jeffrey S. S., Measuring Damages under the United Nations Convention on the International Sale of Goods, 50 Ohio State Law Journal (1989) 737-752 Also available on internet at http://www.cisg.law.pace.edu/cisg/biblio/sutton.html*

regarding the Convention's provision, and not the Convention is indicates any prior existed international court to deals such kind of conflicts. National courts have gone through the complications of law rules, which would be dealt, such kind of conflicted case regarding the provisions of the Convention[10].

One possible harm is that these courts of justice will bring into operation the Convention, within their own lawful customs which shows that they did not get majority view and which results in conveying more than one meaning of any legal documents. This dark possibility may be mitigated to an undefined extent by the said duties of the contracting countries to stick firmly to the earlier case or events of other countries[11].

In CISG Article 7 requires that three general careful thoughts govern the opinions of the Convention: the aim of encouraging similarity in the application to the Convention; the established aims of the Convention are ; formally giving a benefit with the rules of Private International Law. Business methods and developed principles on which laws are based restricts the application of the commercial court in the United States, for instance, we will not even force the opinion of the agreement until an international jurisprudence evolves relating the opinions of the Convention, contracting countries must cautiously consider its different possible opinions about what it means[12].

1.6 Background of Article 77 CISG:-

Article 77 CISG, involves the aggrieved party to mitigate the loss[13]. In case of failure to accept the reasonable measures, the other party possible demand lessens in the

[10] *Ibid*

[11] *Honnold. J. H., Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International, The Hague (1999), Also available on internet at:* *http://www.cisg.law.pace.edu/cisg/biblio/honnold.html*

[12] *Jeffrey S. S., Measuring Damages under the United Nations Convention on the International Sale of Goods, 50 Ohio State Law Journal (1989) 737-752 Also available on internet at* *http://www.cisg.law.pace.edu/cisg/biblio/sutton.html* *[Accessed on 20 February 2011]*

[13] *Cf Article 88 ULIS: 'The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim reduction in the damages'.*

damages. The provision has been grounded on the rule that there is no compensation for avoidance loss[14]. The problems with the regard to mitigation grow in a broad diversity of situations. Generally, the circumstances regarding the breach of contract have been happening prior. Therefore, a vendee who has got the nonconforming goods possible to under the obligation to have them amended. Further, it has been stated that the aggrieved party has obligation to deal the transaction to forbid or should minimize the loss. However, In order to entirely follow the mitigation rule, the aggrieved party might even be waited to cooperate and to do act with the breaching party while they are dealing the transaction[15]. Under the circumstances the obligation to mitigate stands not simply if the loss or even the breach has been happening, but prior to survive as a breach is forbidding. There is complicated troubles have been stood regarding the contract with an anticipatory breach of contract[16]. In article 72 (1) CISG, before the date of performance, the aggrieved party can nullify the contract. Hence, It does look crystallize that the other party would be perform a fundamental breach of contract. In Article 75 CISG, damages could be calculated when there is conflict between the contract cost and the cost deals transaction. On the other hand, under Article 76 CISG can count that if there is confliction between the contract price and the present market price at the point of avoidance[17].

Therefore, If the breach in the future goes crystallized at the moment when the market price are highly unfavourable to the breaching party and the development

[14] *Schwenzer, I., and Manner, S., The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies, Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (2008) 470-488 available at : http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-manner.html [Accessed on 16/06/2011]*

[15] *Judgement by OLG Düsseldorf [OLG = Oberlandesgericht = Provincial Court of Appeal]. Germany 13 September 1996 .Docket No. 17 U 18/96; Also Available at: http://cisgw3.law.pace.edu/cases/960913g1.html*

[16] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 2 May 2011)*

[17] *Schwenzer, I., and Manner, S., The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies, Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (2008) 470-488 available at : http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-manner.html [Accessed on 16/06/2011]*

would be more favourable in the next. Under this circumstance, It has been presented that the aggrieved party should have mitigated the loss not nullified the contract and dealing transaction at once, but they have to expect until the market situations have to be meliorated. However, the legal condition does look bona fide, many real problems stand in these situations which are surrounding the query, what ought to be a reasonable measure under these situations. The result comes up of the case sometimes relied upon the burden of proof. The essential question is that, therefore, whether the aggrieved party could expect till the future contractual date of execution or whether it can be bound to nullify the contract before the date when predicting a market growth goes day by day unfavourable for the party in breach[18].

Though the mitigation rule would normally be enforced in those situations, when the vendee is demanding damages. Most scholars' think that the aggrieved party possibly can expect till the contract accorded date of execution and counting its damages, it could be under Article 74, 75 or 76 CISG, agreeing to that date. While it has been confessed that it is possible highly hard to aware when a 'rising' market has been shooting its top or a dropping market made its lower limit. It has not been possible to decide whether the avoidance of contract at a certain time is needed reasonable measure in Article 77, the rule of mitigation should obtain in this situation. It is almost admittedly that, when the market is growing would be *ex ante* decided with the reasonable surety. Therefore, under the circumstance, the aggrieved party does not have any legitimate concern in expecting till the accorded date of the execution for the exclusive aim of imposing further damage on the party in breach[19].

1.7 Legislative History:-

UN Convention on International Sale of Goods, normally known as the CISG, 'Sale Convention' or 'The Convention' and it has a very comprehensive history. The delegation of **the Vienna Diplomatic Conference** has been met in 1980, to assume the CISG, they conceived a 1978 draft followed by the Secretariat Commentary on it. Most of the part of this commentary was staying on to the point. When the section of

[18] *Ibid*

[19] *Ibid*

the CISG W3 information was presented for the acknowledgment to scholarly writing, and it was included in over 250 single space pages of citation to the writings on the CISG. There are resumes and detailed applicable consequences came from the legislative history of the Convention prior to the Vienna Convention. At this meeting, there were a few cases of priority of attention to the Secretariat of the Commentary which are as below;[20]

"*(i) It summarizes and explains relevant conclusions derived from the legislative history of the Convention prior to the Vienna Conference;*

(ii) It was used extensively by the delegates to this conference as a guide to the meaning of the provisions of the 1978 Draft they considered;

(iii) Based on this Secretariat Commentary and their further deliberations, in, in most cases the delegates approved these provisions of the 1978 Draft either verbatim or substantially as written;

(iv) As an official document prepared pursuant to a resolution of the United Nations General Assembly, the Secretariat Commentary is the closest available equivalent of an Official Commentary on the Convention;

(v) Also, like the Convention, it is obvious from its source and contents that the Secretariat Commentary is not designed to favour legal interpretations prevalent in any one legal system versus another"[21].

However, due to its certification, when the Secretariat Commentary conforms to the Official Text as a 1978 Draft, which may be very convincing quotation that could be presented to a tribunal. This draft brings forward to interpret the Convention in any of the other states which many of the proceedings might be held. The text of the Secretariat Commentary has been demonstrated in the Official Records of the Vienna Diplomatic Conference at Official Records[22].

1.8 Report of the 1977 UNCITRAL Committee:-

[20] *CISG Article 77, Legislative history guidance, Copy right by PACE Law School Institute of International Commercial Law; Available on internet at: http://cisgw3.law.pace.edu/cisg/text/roadmap/RoadmapL-77.html [Accessed on 16/06/2011]*

[21] *Ibid*

[22] *Ibid*

The current section of the legislative history of the CISG has been described in *United Nations Conference on Contracts for the International Sale of Goods* in *Vienna* on *10 March to 11 April 1980.* *UNCITRAL* yearbooks have been described in the beginning of the legislative history of the Convention.

The scope of the UNCITRAL development of the CISG is as below;

"The current uniform rules are rooted in two earlier Conventions sponsored by the International Institute for the Unification of Private Law (UNIDROIT). These Conventions -- One dealing with the formation of contracts for the international sale (ULF), the other with obligations of the parties to such contracts (ULIS) -- were developed over the course of three decades by leading commercial law experts of Western Europe and were finalized in 1964 by a diplomatic conference at The Hague. The 1964 Hague Conventions entered into force among nine states but, in spite of their fundamental importance, failed to receive substantial acceptance outside Western Europe"[23].

Therefore, regarding to Article 77, the text of Article 59 which later on has been becoming Article 77 of the CISG. The text of Article 59, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The party who relies on a breach of contract must adopt such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated"[24].

However, the Committee deliberated many proposition regarding to the above said Article such as:

"If he fails to adopt such measures, the party in breach may claim a reduction in the damages, including any claim for the price, in the amount which should have been mitigated"[25].

As for as, there were many suggestions were received regarding to this text, some were in favour and some were in opposition.

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[23] *LEGISLATIVE HISTORY: Summary of UNCITRAL legislative history of CISG, Copy right by PACE Law School Institute of International Commercial Law; available on internet at:* *http://www.cisg.law.pace.edu/cisg/linkd.html [Accessed on 2/06/2011]*

[24] *Report of the 1977 UNCITRAL Committee of the whole I relating to the drafting Convention on the International Sale of Goods. . The Committee was established by the Commission at its 180th meeting, on 23 May 1977. Copy right by Pace Law School Institute of International Commercial Law;The report also available at internet:* *http://www.cisg.law.pace.edu/cisg/legislative/doc-B01.html [* Accessed on 12/06/2011]

[25] *Ibid*

There was favour of this proposal and has been submitted if the vendor was in breach, it is a duty of the vendee's to mitigate the damages might be comprehended the purchase of replace the goods. Under the introduced text of the article 59, there is publicly described that if the vendee has been in breach, then the vendor could be managed the process for the price even he could be sold out the goods somewhere else. In this situation, the proposal has been formulated to ascertain that in particular cases where the vendor's right of recovery would limit to the amount recoverable under article 57[26].

There was substantial opposition regarding to this proposal which has been deliberated to allow a defaulting Vendee to forbid payment of the buy price pointing that the vendor could be sold out goods somewhere else. It would be destructed the differentiation between a process of the price and process for the damages. The differentiation has been underlying in numerous legal system. The price of the goods were consorted by the parties, and there is another right which the vendor has got, if the contract is yet existence, the vendor must have right to litigate the vendee for the price. There was no specific duty imposed on the vendor to attempt, or have this offer from a third party a price might be lower than they have agreed before with the vendee if he might be reclaimed the conflict from the Vendee[27].

Therefore, after careful consideration, the Committee regulated, they are not going to continue the proposal expanding the principle, "*of mitigation to actions for the price".*

The Committee did not continue a proposal that the article 59 especially caters that the part of the duty,

"*To mitigate should be that the injured party gives notice of the breach to the party in breach, within a reasonable time of its occurrence".*

Finally, the Committee has decided that there is no any modification would be called for regarding to article 59. However, it was recommended by the Committee that the Commission should be adopted the text as below;

[26] *Ibid*

[27] *Ibid*

"The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated"[28].

1.9 1980 Vienna Conference:-

It has been adopted on 11 April, 1980. The aim of the CISG is to supply an advanced, undifferentiated and fair authority for contracts for the international Sale of Goods. Hence, the CISG leads importantly to innovating certainty in commercial replaces and reduce the transaction prices. The contract of sale is the keystone of international trade in wholly states regardless of their legal customs or the degree of economic evolution. The CISG believes one of the essences in international trade law convention and it is adoption in the world wide is worthy. The CISG outcomes of a legislative endeavour and it have been commenced at the commencement of the twentieth century. The text which has been provides a deliberate residue between the concerns of the vender and the vendee. It has been animated contract law reforms at the national degree[29].

As mentioned earlier, that the adoption of the CISG supply an advanced, consistent legislation for the international sale of goods and it would be adopted if the contract for the sale of goods are conducted between the parties whose offices of businesses are located in various contracting countries. Under the circumstances, the CISG would be enforced right away, ignoring recourse to govern of private international law to regulate the law relevant to the contract. Moreover, it has been bestowing the importance to the certainty of the international sales contracts[30].

Further, it has been stated that might be the application of the CISG to a contract for the international sale of goods are governed of private international law direct at the law of a contracting country if they are relevant one. On the other hand it could be an

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[28] *United Conventions on Contacts for the International Sale of Goods (1980)[CISG], Copy right by PACE Law School Institute of International Commercial Law; available on internet at**:** http://www.cisg.law.pace.edu/cisg/text/treaty.html*

[29] *United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html [Accessed on 17/06/2011]*

[30] *Ibid*

option of the contracting parties, no matter of whether their offices are situated in contracting countries. Secondly, the CISG caters an impersonal consistency of regulation and it could be well admitted in alight of multinational quality[31].

Eventually, small and medium classified enterprises and dealers situated in formulating states they have got decreased approach to legal proposals as they are managing the contract. The same enterprises and dealers might be lighter contractual parties and can have trouble regarding the assuring that the contractual proportion has been held. Those merchants could get specific profit from the default application of honest and consistent authorities of the CISG whose contracts dropping under its range. The CISG regulates contracts for the international sales of goods between individual businesses. It has been excepted sales to consumers and sales of avails, and further sales of a certain particular kind of goods. Strictly, domestic sale contracts have not enforced by the CISG and it would be kept governed by the domestic law. Further, it has been stated that the international contract which are dropping beyond the range of application of the CISG, would not enforce by the CISG[32].

1.10 Pre-Conference Proposals of Governments and International Organisations:-

There is a manifold proposal of Governments and concerned International Organisations on the draft Convention on Contracts for the International Sale of Goods have been submitted to the Conference in reply to a determination of the General Assembly[33].

Comments and proposals from various states and many international organisations from various areas of the world were regarded as and long arguments were deemed for many years.

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[31] *Ibid*

[32] *Ibid*

[33] *LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference. Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses; Also available on the webpage of Pace Law School Institute of International Commercial Law at:* http://www.cisg.law.pace.edu/cisg/Fdraft.html *[Accessed on 16/06/2011]*

This document has not been published when the comments and proposals were called off. They have received analyse comments and proposals on this document as at 8 February 1980. Therefore, Comments and proposals have been received from those Governments and organisation which are as below;

"*Australia, Austria, Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Finland, France, Germany, Federal Republic of Ireland, Israel, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia*".

Apart from the above mentioned countries, there are few International Organisations who have taken a part as well which are as below;

"World Intellectual Property Organisation (WIPO) Central Office of International Railway Transport, Berne (OCTI) and International Chamber of Commerce (ICC)"[34].

1.11 Relation to the other Articles in CISG:-

It is very much significant to discuss the concerned articles and its importance in CISG. Basically, Law trusts on general principles, and when discussing the views or contents of the CISG, it is very much important to have a look at connecting articles and provisions. Article 77 has a division "*of the section entitled Damages*". Article 77 deals to the damages and it does not specifically enforce to remedies other than damages which are available under the Convention[35]. Other articles of the Convention possible postulate the parties to have particular measures to save versus the losses. Therefore, Articles 85 to 88 supplied that the vendees and the vendors should have reasonable actions to save the goods in their possession adopting breach[36]. Followed by the article 6, the vendor and the Vendee possible harmonies to minimize from or alter the rule established in article 77. In one decision has been found that when the aggrieved party attempts to impose a punishment article in the

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[34] *Ibid*

[35] *Digest of Article 77 case law: 2008 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods; Copy right by PACE law School: Available at:* http://www.cisg.law.pace.edu/cisg/text/digest-art-77.html#b

[36] *Judgments by China International Economic and Trade Arbitration Commission [CIETAC] (PRC)-Shenzhen Commission, China 6 June 1991 CIETAC-Shenzhen Arbitration, Docket No. CISG/1991/03. Also available at:* http://cisgw3.law.pace.edu/cases/910606c1.html

contract. Article 77 does not postulate the aggrieved party to decrease the punishment regarding to mitigate the loss[37]. Article 77 does not say that at what stage in a legal process the matter of the mitigation should be regarded by the court or tribunal. In one decision has been found that the query of whether mitigation must be regarded in a process on the virtues or in a classify process to find out damages is a procedural matter formulated by the domestic law instead of the Convention[38].

1.12 Problems Pertaining to Article 77 of the Convention:-

CISG supplies various remedies to both the Vendee and the vender in the perusal of breach of contract by the other party. Amongst them is the remedy for the vendee with regards of specific performance or damages from the vendor under Article 45 or the vendee could take remedy under Article 61 of the Convention. Article 77 is simply linked to the damage which arises of the breach of contract by the other party. Hence, when the vendor takes the remedy of specific performance and postulate for the payment of the cost, then he could wonder for the measures which have been taken by the vendee in order to mitigate the loss. Similarly, the vendee could not demand the decrease of price on the identical bases[39].

Whereas when the vendor who has been possessed of goods, does not announce the contract avoided or organisation for the resale of goods, but require for the payment of the price. The Vendee in breach of the contract does not accomplish his obligations and avoid for payment of the goods. The article 77 of the CISG will be enforced here in this circumstance and the vendee can be demanded the reduction in the sum of damages for the lack of measure which were essential to be taken by the vendor to make the goods securely and mitigate the damages[40].

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[37] *Judgment by Hof Arnhem [Hof = Gerechtshof = District Appeal Court], Netherlands 22 August 1995 Appellate Court Arnhem, Cae No.94/305; Also available on internet at: http://cisgw3.law.pace.edu/cases/950822n1.html*

[38] *Judgment by Bundesgerichtshof [Federal Supreme Court], Germany 24 March 1999 Supreme Court, Case No. VIII ZR 121/98. Translated by Alston & Bird LL.P; Also available on internet at: http://cisgw3.law.pace.edu/cases/990324g1.html*

[39] *Knapp, V., Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 559-567. Available on internet at http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb77.html (accessed on 25 June 2011)*

[40] *Ibid*

The query is able to be discussed at this point, whether the actions must be to perform under Article 77 are to be conducted merely after the breach has been done or it could be done still ahead the contract has been nullified. With these respect proponents of the Convention state that the phrasing of the Article indicates that the aims of this provision is to secure the party to contract from loss. However, the actions have been required to diminish the loss should be accepted as early as the terror of damages is foreseen by the party in possession of the goods[41]. Where as some measure could not be accepted before time such as resale of buying goods regarding to mitigate the damages[42].

Article 77 has enforced to the both breach of contract and anticipatory breach of contract abidance with Article 71 of CISG. However, the duties to accept measures for the mitigation of loss are mandatory in both conditions where the performance under the contract is imputable or the conditions demonstrate an anticipatory breach of contract before the time of performance. Under these circumstances, where the contract has avoided under Article 72 due to an anticipatory breach of contract, yet then the injured party must adopt sensible paces to diminish the losses in order to mitigate the damages. When the injured party in the knowledge of the situation of the other party such as failure or other thing which has been restricted his ability to perform under the contract, should not expect for the due time of the performance and require for specific performance. Under these circumstances, the injured party will faulty of not accepting the reasonable measures as were demanded under the position of the case[43].

1.13 Significance Aims and Position of the "Mitigation" Provision:-

The thought of the principle of mitigation loss is that if the aggrieved party fairly nullified the loss then they could not be able to recover the damages regarding to the

[41] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 2 May 2011)*

[42] *Knapp, V., Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 559-567. Available on internet at http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb77.html (accessed on 2 May 2011)*

[43] *Ibid*

loss. The aim of this principle is forbidding about the offended party, who is expecting a loss to once happen and then they could go for the litigation against the party regarding to this loss. This loss could be nullified by the offended party[44]. If this matter is discussed by the economically eyes, they have stated it is unreasonable, to allow someone to increment the damages, which can be decreased by getting the appropriate actions[45].

This perception has been ruminating in Article 77 under the CISG which is as below;

"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated"[46].

The requisite of mitigation of loss has been concerned for the offended party's right to damages. It has been adopted by Article 77 that in case of aggrieved party unable to mitigate, the party would have been the right to claim diminution in damages by the sum which is to be ignored[47]. In this situation, the failure to mitigate would not be impacting the offended party's claim for other remedies[48]. There is an exclusion is in these circumstances regarding to the case, where the offended party has to be appropriated anticipation to follow up the sure steps. For instance, in case of

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[44] *Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sales Convention. Giuffrè, Milan, (1987).*

[45] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 15th June 2011)*

[46] *United Conventions on Contacts for the International Sale of Goods (1980)[CISG],Copy right by PACE Law School Institute of International Commercial Law; available on internet at: http://www.cisg.law.pace.edu/cisg/text/treaty.html*

[47] *Ibid*

[48] *Knapp, V., Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 559-567. Available on internet at http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb77.html [accessed on 2 May 2011]*

mitigating the loss, there is a kind of nullified of the contract or the consequences of a comprehend transaction[49].

When the damages should have been decreased regarding the consideration of the sum, then underneath rule will be adopted[50]:

1. "The full amount of damages should be calculated. This should be done according to the rules provided for in Articles 74-76;

2. The amount of loss, which should have been avoided, should be established;

3. The second amount should be deducted from the firs"[51].

There is another matter is able to be deliberated, which is the "status" of this provision. This is to be designed whilst it is enforcing a responsibility on the *party. "Party…. must take such measure"[52].*

Therefore, it was submitted by some authors that the provision in Article 77 is one of the respective provisions of the convention (untidily with Articles 85-88), which has been supplied, "*a duty owed by the injured party to the party in breach"[53].* Whereas it was submitted that under the provision, the offended party "is under an "*obligation to her herself*" to mitigate her loss. Hence, it does look that the couple of these suggestions could not be entirely assumed as rectify. At the commencement, they have determined the responsibility as a legal bond, if the one party has been gentled to asking for from the other party to the execution of surely step. On the foundation of Article 77, the breaching party could not be asked for from the offended party to the

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[49] Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 17th June 2011)

[50] Ibid

[51]Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987).

[52] United Conventions on Contacts for the International Sale of Goods (1980)[CISG],Copy right by PACE Law School Institute of International Commercial Law; available on internet at: http://www.cisg.law.pace.edu/cisg/text/treaty.html

[53] Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 17th June 2011)

execution of the "duty". However, the offended party has not got to be any "duty" to the party in breach. Secondly, they are talking about the pertain to mitigation as to *"as responsibility to him or herself"*. There would be a contradiction in this term that the contents of the responsibility as a legal construct and finally in the end, they could not build up a duty to him or her[54].

On the other hand, they have looked over the feasibility regarding to the concern to mitigation which is to apply such kind of conditions as a "duty" or an *"obligation,"* the type of this *"duty"* is potentially dissimilar from the other responsibilities under the CISG. In reality, it has not been comprised a contractual responsibility. It has been two principle causes for these consequences. Prior, the first cause is very concern able, but it has been repeated, the "duty" under Article 77 has not constitute a legal bond between the parties, which has given rectify to ask for a sure step from the other[55].

In second case, under the Convention, the breach of *responsibility* has been founded for liability[56]. Under the CISG, any kind of liability regarding the breach of "duty" to mitigate would not be risen up. The aspects of this provision contributed to the development of a usual principle who has been launched a duty of "*loyalty to the other party to the contract*", the result which would become in damages has not been in privilege. The disobedience with the Article 77 means the loss by the injured party of the right to demand regarding to those damages which could be nullified. However, with the perspective of this provision could be led to the development of a general principle. And the duty has been demonstrated with regard of "*loyalty to the other party to the contract*", the breach of which outcomes in damages are not backed up in this task. Therefore, it does look that the "duty" to mitigate has been found to deny implementing the party's right to specific performance. Under these circumstances, in a legal point of view, this provision should not be represented like

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[54] *Ibid*

[55] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 17th June 2011)*

[56] *Schlechtriem, P.,Commentary on the UN Conventions on the International Sale of Goods (CISG) 2nd Ed., Oxford University Press, (2005).*

an obligation. Its mandatory work is too forbidding the party's practicing his right to the cure of specific performance[57].

The view shows in this task, if the access has taken by the English Law regarding the sculpture of the "duty" to mitigate. The relevant stipulation has been phrased as bellows:

"*A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests*"[58].

[57] *Ibid*

[58] *Ibid and also, In the UNIDROIT Principles this principle has been formulated in such a way that the problem of the "status" of the provision is not likely to arise. In particular, Article 7.4.8(1) provides as follows: "The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps."*

Chapter No. 2

MITIGATION OF LOSS, METHDOLOGY IN CISG AND ANALYTICAL VIEW

2.1 MITIGATION OF LOSS, METHODOLOGY IN CISG AND ANALYTICAL VIEW:-

Commentators have separately described the duty enforced by Art.77 as a clear expression of 'public policy against waste',[59] 'a duty to mitigate',[60]'a duty to co-operate',[61] and 'an obligation to oneself'[62]. An exact translation of this Article puts forth a requisite on the party depending on breaking of a rule to do something- but it should be true in situations- to lessen the loss or damage[63]. When the party fails to do so "(again on a literal interpretation)", there is a chance for the non-performing party[64] to ask for a reduction in payment for damages. The conflict between Art.77CISG and Art.7.4.8UNIDROIT principles is not that one seems to enforce a duty on a party and the other does not. The level of confliction is that Art. 7.4.8. (1) Clearly states that the lessening of harm is automatic if the suffered party could have taken precautionary measures to reduce the harm (but it does not do so)[65]. However, the confliction between the choice and a right to have damages decrease seems

[59] *McMahon. J.P. Drafting CISG Contracts and Documents and Compliance Tips for Traders, January 2004. Available at: http://cisgw3.law.pace.edu/cisg/contracts.html#a77*

[60] *Jeffrey S. S., Measuring Damages under the United Nations Convention on the International Sale of Goods, 50 Ohio State Law Journal (1989) 737-752 Also available on internet at http://www.cisg.law.pace.edu/cisg/biblio/sutton.html*

[61] *Vilus, J., Provisions Common to the Obligations of the Seller and the Buyer, Petar Sarcevic & Paul Volken eds., International Sale of Goods: Dubrovnik Lectures, Oceana (1986) Ch. 7, 239-264. Available at: http://cisgw3.law.pace.edu/cisg/biblio/vilus.html*

[62] *Judgment by Tribunal OLG Graz [OLG = Oberlandesgericht = Provincial Court of Appeal], Austria 24 January 2002 Appellate Court Graz. Translated by Veit Konrad . Available at: http://cisgw3.law.pace.edu/cases/020124a3.html. See also Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[63] *Opie,E., Commentary on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG, January 2005. Available at : http://www.cisg.law.pace.edu/cisg/principles/uni77.html*

[64] *The second sentence of Art. 77 states that 'the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'.*

[65] *Opie,E., Commentary on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG, January 2005. Available at : http://www.cisg.law.pace.edu/cisg/principles/uni77.html*

minimum- in practical application, the non -performing party would preferably ask to bring down any loss to be paid for a breach of contract[66].

2.2 The Importance of Mitigation of Damages Provisions of the Convention:-

The CISG gives security not simply to the aggrieved party but as well secures the party in breach from unreasonable losses in case of breach of contract. Therefore, it enforces some responsibilities to the aggrieved party to take suitable strides in order to mitigate the losses of the party in breach. The Article 77 of the CISG does not permit the aggrieved party to have the damages from the loss which could be preserved. The estimation rear this is to lessen in harm and preserve the losses which are easily avoided so as to cut down the damages[67].

The object of Article 77 is to lessen the loss as feasible as possible. Sensible paces towards the mitigation of damages are regarded as resale of goods, which were not followed to the contract, by the vender or vendee to the third party[68].

In case of faulty goods the purchaser can be demanded rectifications in the goods under Article 46(3) of CISG rather demand of delivery of alternative goods under Article 46(2). The demand of alternative goods is by the purchaser is costly as it costs too much for the purchaser if the amend of goods is easier and cheaper and still the purchaser can make them until by himself[69].

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[66] Arbitration (ICC) June 1999, Case 9187. Also available on internet at: http://www.cisg-online.ch/cisg/urteile/705.htm

[67] *Riznik, P., Reasonableness of the Measures Undertaken to Mitigate the Loss, Nov, 2009. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/riznik.html (accessed on 17 July 2011)*

[68] *Knapp, V., Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 559-567. Available on internet at http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb77.html (accessed on 17 July 2011)*

[69] *Honnold. J. H., Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International, The Hague (1999), Also available on internet at: http://www.cisg.law.pace.edu/cisg/biblio/ho46.html [Accessed on 17 July 2011]*

The obligations of the aggrieved party who depend upon on the breach of contract are commencing in the second component of this article which affects the aggrieved party to do the reasonable attempts in reasonable conditions for the mitigation of damages. Therefore, the aggrieved party cannot be charged for and exacted to do these kinds of measures which are unreasonable and out of this the normal situation of the aggrieved party[70].

As cited earlier, article 77 boosts the party in breach to the extent of mitigation of damages merely. The duties of the purchaser under Article 77 are dissimilar from the liabilities current in the other provisions of the Convention for both the trading parties. Therefore, turning on these responsibilities of the aggrieved party under Article77, the party in breach could not be avoiding the contract. Neither, the party in breach, under the shadow of this article can be avoided the damages. It is simply enforcing some responsibilities on the shoulders of the aggrieved party. But when the aggrieved party is miscarrying to perform his obligations, he will endure simply the loss of the part of the damages which could have been nullified. Thus, as counting the mount damages, then some of the damage which could be nullified by the aggrieved party by accepting a reasonable measure, would be derived[71].

2.3 Duty to Mitigate Damages:-

The party who is admittedly to the contract cannot expect for the other party to breach the contract, he should be dynamic with regards to minimize the loss or to forbid it at least. In this view, the mitigation philosophy is that, which usually accepts responsibility in Common Law. Although, it is not so broad and crystallized committed in Civil Law, it covers this kind of "*obligation for a creditor to minimize the damage he suffers because of the non-fulfilment by the debtor of his own commitments*"[72].

[70] *Knapp, V., Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 559-567. Available on internet at http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb77.html (accessed on 17 July 2011)*

[71] *Liu, C., Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles and PECL. Sep 2003. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei-77.html (accessed on 17 July 2011)*

[72] *Ibid*

At present, there are numerous of international awards have been enforced it which is like a universal principle of international trade. It is not concerned to a Common Law system. In fact, it is stated to "constitute the *lex mercatoria* in its present form" and it has been considered one of the best founded universal principles in case law. Furthermore, it has been stated that the awards in favour on mitigation seldom thinks that the *lex mercatoria* is in various phrases; they have simply dealt the principle as self explanatory[73].

It is commonly said that the mitigation has obtained under the three pawns. It is looked upon like one of the principle "*capable of general application*" when explicit in provisions of the CISG. Article 77 of the CISG, has an especially relevancy (the mitigation principle is meditated in the Arts. 85 and 86 regarding save the goods), which has determines damages by directing an obligation to mitigate damages to the aggrieved party:

"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated "[74].

Therefore, Article 77 CISG takes the similar principle as Art. 88 ULIS, but it clears up certain issues[75].

The commentary which has been passed by the Secretariat on Article 73 of the Draft[76], it has been said that Article 77 (combined with Arts 85-88) is one of the respective articles which says an obligation owed by the injured to the party in

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[73] *Ibid*

[74] *United Conventions on Contacts for the International Sale of Goods (1980)[CISG], Copy right by Pace Law School Institute of International Commercial Law; available on internet at :http://www.cisg.law.pace.edu/cisg/text/treaty.html*

[75] *Liu, C., Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles and PECL. Sep 2003. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei-77.html (accessed on 17 July 2011)*

[76] *LEGISLATIVE HISTORY: Legislative history of CISG article 77: Match-up with 1978 Draft to assess relevance of Secretariat Commentary, Copy right by PACE Law School; Also available on internet at:http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-77.html*

breach[77]. Therefore, when it is capable to concern to mitigate utilizing this form of conditions like a 'duty' or 'obligation', the quality of this duty is dissimilar from the other obligation under the CISG. In terms of Article 77 is that the beginning sentence is phrased regarding the duty to mitigate, it is possible courts can expect such kind of mitigation, and permit a start in support of the breaching party for bankruptcy of the non breaching party to mitigate. The second sentence does look to get access that the CISG article 77 was not thought to direct liability on the injured party for dropping to nullify damages, but it is signified only prevented an injured party from dealing damage which could have been reasonably nullified[78].

The third version of Art 77 CISG gets the place that the mitigation of loss can get a sword also as a damage shield. It is described on the *"general principles"* provisions of the CISG, Art 7 (2) to originate a duty of "*loyalty to the other party to the contract"*. Bankruptcy to mitigate damages can be possible a breach of this duty and its outcomes is in retrievable damages[79]. It seems that the arguments of the duty to mitigate under Article 77 have ambiguity. It does not involve the aggrieved party's right to looking for specific performance or his right to nullify the contract, if a central breach has been happening. It has been stated also, that the larger particularity would have to be provided in the brightness of the structure of the CISG, which is the universal principles based on Art.7 regarding to the duty of bona fide[80]. However, the importance and calculations in Article 77 is admittedly[81]. The mitigation duty is acquired under the two principles. First, in the UPICC, this principle has been speculated in Art7.4.8 under the leading *"Mitigation of Harm"*. It is developed as below;

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[77] *Secretariat Commentary on Art. 73 of the 1978 Draft, Comment 2. Copy right by Pace Law School. Available online at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-77.html*

[78] *Liu, C., Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles and PECL. Sep 2003. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei-77.html*

[79] *Ibid*

[80] *Ziegel,J, S., Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods. Available online at http://www.cisg.law.pace.edu/cisg/text/ziegel77.html*

[81] *Liu, C., Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles and PECL. Sep 2003. Available on official website of PACE Law School at:http://www.cisg.law.pace.edu/cisg/biblio/chengwei-77.html*

"*(1) The non-performing party is not liable for harm suffered by the aggrieved party to performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.*"

In fact, it has been said that the provisions of the UPICC on contribution to harm should be examined jointly by Arts 7.4.8 and 7.4.7. The objective of Art 7.4.8 is to nullify the aggrieved party is inactive and expecting to be compensated for damages. Under this situation, any damages which the aggrieved party have been nullified by accepting the reasonable actions would not be compensated[82].

2.3.1 Appropriate Actions Taken:-

The idea behind covering of the loss is that the aggrieved party could not get back his loss which would have been avoided. Therefore, the party need not to take special measures, except those that are required to protect the loss as are reasonable in different cases. According to Article 77 CISG, the aggrieved party should get take measures, which are reasonable in these situations. Of course, this kind of steps need to be taken relies upon the standard of reasonableness. Reasonableness, successively, rely on and will be understood in the light of that particular situation[83]. Therefore, it is stated that the duty to mitigate enforces to an anticipated breach of contract and the obligation of execution of a breach which is presently due. It leads that the provision relates the duty to mitigate to an entire form of the loss. However, various types of loss can create a variety of circumstances[84]. Whilst, it is not clearly specified that the reasonableness in available in thirty-seven provisions of the CISG and clearly adverted to elsewhere in the uniform sales law. However, reasonableness is a general rule of the CISG. As a general rule of the CISG, reasonableness have a solid impact on the right submission of all provisions of

[82] *Ibid*

[83] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[84] *Liu, C., Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles and PECL. Sep 2003. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei-77.html*

the CISG[85]. Whereas, the rule of “reasonableness" acts a prominent and repeated part in virtually all of the provisions of the UPICC. Though, it is no covering clause is available in CISG or the UNIDROIT principles, which defines the opinion of reasonableness. It is defined in the PECL, which as well suits the way in which this construct is used in the CISG and also as the UPICC). This definition can be used by researchers to enforce in the CISG and the UPICC too. However, with this regard, Art. 1:302 PECL differentiates "Reasonableness" as below:

"Under these principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account"[86].

It is broadly talking that the reasonableness should be guessed based on the parties bona fide and the same circumstances which would be regarded as reasonable. However, it is determining that what is reasonable all important points should be considered. The category and objective of the contract should be taken into account. The situations of the case should be understood. Therefore, added to this, the use and implementation of trade or profession should also be considered. These usually show the act of reasonable parties[87].

Therefore, usually it has been stated that a measure is reasonable, when under the specific conditions happens, it could be required to be accepted by a person played in bona fide or when it has ‘adequate’ or if it is 'adequate' and forbidding regarding to the loss. In the analysis of the situation, the party's business skills like innovative, experience and financial resources etc should also be taken care of. However, it is the utilization of trade is applicable if they have got any should also be allowed. The aggrieved party in any way not forced to face 'excessive' and unreasonably high

[85] *Kritzer, A, H., Comments on Reasonableness; Available online at: <http://www.cisg.law.pace.edu/cisg/text/reason.html#view>.*

[86] *Liu, C., Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles and PECL. Sep 2003. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei-77.html*

[87] *Ibid*

disbursements and dangers. If the party abstains from this kind of measures, he will not be regarded as not having met with specified standards of Article77[88].

Though it is difficult to show every single measure which can be entailed in Art.77 CISG. It is said that such methods may time and by adding a deal buy or sale. The possibility of the buyer rectifying the defective goods can also be included. Even if there is no obligation to avoid the Contract even when the party has confide or is awaited to be confided a basic breach of contract (Art.49 and 64 CISG). It has been avoiding of the contract can possibly a single reasonable measure which boosts up to mitigate the losses of the injured party. However, reasonable measures accepted before a possible breach of contract and they have to be accepted by the party threatened by loss. This kind of measure included releasing of execution under Article.71[89].

2.3.2 Effects of Failure to Take Action:-

With concern to the legal possibilities of such failure, according to Art.77 CISG the party who broke the contract may ask for lessening the damages, that, non performance of this duty by one party it does not mean it applicable for the other party to ask for damages but instead of it follows to a position where the right party cannot demand full coverage for damages. Here it is referred only to a party claiming damages. The principle of Art 77 is not applied to other solutions[90].

Therefore, unsuccessful mitigation will not have any impact on the injured party's claim for other ways out. It was simply excused in the case if it was reasonable to expect the injured party to take forward few actions. With regard to the total number, it comes from Art 77 CISG that if the aggrieved party does not cover up the loss, the suffered party will have the right to demand a reduction in damages "*in the amount*

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[88] Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html

[89] Ibid

[90] Liu, C., Remedies for Non-performance:Perspectives from CISG, UNIDROIT Principles & PECL: September 2003, LL.M. of Law School of Renmin University of China P.O. Box 9-01 No. 1 (International Law) Law School of Renmin University of China 59 Zhongguancun Street, Beijing 100872, China by available at: http://cisgw3.law.pace.edu/cisg/biblio/chengwei-77.html

by which the loss should have been mitigated"[91]*.* In this regard, same methods can also be found in UPICC Art.7.4.8 (1) and PECL Art.9:505 (1). Where as often the aggrieved party would have to be received some more expenses regarding the mitigation of loss. The trouble is that mitigation itself can produce certain classification of loss. In other words, mitigation itself can be the reason for the loss. While trying to make the mitigation less severe, the injured party possibly has to confront number of other expenditures such as, for example, storage costs, repair costs or brokerage costs. Both Art.7.4.8 (2) UPICC and Art.9:505 (2) PECL permit the aggrieved party to get back the expenditure sensibly done while reducing the loss or avoid. Therefore, expenses should be given back even if they exceed the total loss, on a condition that they should be genuine. Those expenses which are born by the party for the measures he takes to cover up his loss, can also be demanding compensation for though when the, differently reasonable, actions were taken in vain. In addition, It is discussed that, the phrasing of Art. 77 CISG is large adequate to demand that losses out of a measure focused on mitigation should be mitigated.

However, the point to be marked is that, regardless any loss which the aggrieved party could have avoided by accepting right actions would not be supplemented, the lessening of damages that the aggrieved party has not taken required actions to meet the loss must not cause harm to that party. The party in loss possibly, hence, gets back from the non-performing party the money spent obtaining by it in mitigation the harm, on a condition that those expenses were reasonable in these situations[92].

2.3.3 No Reimbursement for Avoidable Loss:-

According to the domestic law under the CISG: a plaintiff cannot be retrieved for those damages which could get avoided by reasonable steps. Under the circumstances, Article 77 enforces in this regard[93]:

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[91] *Ibid*

[92] *Ibid*

[93] *Lookofsky, J., The 1980 United Nations Convention on contracts for the International Sale of Goods: Article 77, Mitigation: No Recovery for Avoidable Loss. Available on official web page pf PACE Law School at:* *http://cisgw3.law.pace.edu/cisg/biblio/loo77.html* *[Access on 20/07/2011]*

"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated".

There is no convention 'duty' to mitigate in this regard. Therefore, a party who is not successful to have the reasonable measures to mitigate loss could not be retrieved for the loss which is already mitigated. Such kind of principle has been enforced with respect of likely failure to perform: once the party has caused too aware that the performance by the other party would be upcoming, he is awaited to have such positive actions which are allowed in the situation to avoid loss[94]. While in domestic law under the CISG: the avoid ability principle decides instantly which we have calculated the contract deal and market cost of different terms. They are also dealing the recovery of loss under the general article 74 rules which are restricted by the mitigation principle[95].

2.4 Appropriate Steps in Mitigation of Damages in the Circumstances Where Volume is Lost:-

The "lost volume" position should be managed by the CISG. If the "lost volume" seller meets the requirements suggested by this work and maintains the standards for limiting damages, he shall be allowed to recover the loss. Nevertheless, it is not possible for one particular standard to be carried out by "lost volume"[96].

Mitigation measures vary with various circumstances. Nevertheless, if a vendor faces loss of volume, he should find a new buyer to cover up the loss and resell the goods with according the original contract. When he does this resale, supposing he does execute his duty to mitigate, indeed he cannot avoid the loss. He will not compromise with his profit,

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[94] *Lookofsky, J., The 1980 United Nations Convention on contracts for the International Sale of Goods: Article 77, Mitigation: No Recovery for Avoidable Loss. Available on official web page pf PACE Law School at:* http://cisgw3.law.pace.edu/cisg/biblio/loo77.html

[95] *Ibid*

[96] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at:* http://www.cisg.law.pace.edu/cisg/biblio/saidov.html *(accessed on 15th June 2011)*

lost due to the loss of the first agreement while making the second contract. As the second dealings, would have, as well been done.

Hence, it is understood that a "lost volume" vendor cannot take up his damages. Can we come to a satisfactory way of dealing with provision, given in Article 77? It does look that Article77 does not stop us from making this kind of conclusion. It says that mitigation ways should be such that they should be adjusted according to the situations. Such ways which do not involve mitigation cannot be termed as "*reasonable*"[97].

2.5 Classification of Loss:-

In Article 74, it caters for compensation for *"loss, including loss of profit"* and it has survived as a result of the breach. Understanding the reasoning of this requirement, it could be understood that loss should be classified into two main classifications: real or "*effective"*[98] "*loss and loss of profit*". However, apart from this broad part, Article 74 does not specify what physical type of loss could be remunerated. Under a specific contract and situations, the principle of entire remunerated for harm should be the reason for determining the loss[99]. This principle brings us to the consequence that all forms of loss, survived by party and reason by breaking of laws which are redeemable.

Somehow, some commentators have worked on different types of losses. Specially, in a case of real loss,

"Losses caused by breach of contract may take the form of loss by the non-performance as such, incidental loss, or other losses consequent upon the breach consequential loss"[100].

This commentator has named these kinds of loss and checked the direction those losses be dealt under the CISG. Under the CISG, currently the writers have

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[97] *Ibid*

[98] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 15th June 2011)*

[99] *Schlechtriem, P., Commentary on the UN Conventions on the International Sale of Goods (CISG), Second Edition, 1998.*

[100] *Ibid*

appreciated this effort to describe the losses, which are redeemable and, because of that, to clear up the position in this regard[101].

Therefore, in this task, this kind of categorization is not dependable. It is proposed that there is no need to try to appreciate such a category which has diverse kinds and it can arise in practice. Article 74 has been framed to cover any position which results in any case or kind of loss, under the condition that its requisites are met. Hence, it does look that the stipulation of the practical application of this required provision, there is no demand to look at a position by the proposed categorisation, since the rule in Article 74 will be answered. Neither, it does the categorisation required for the improvement of the hypothesis of the CISG. In a legal strategy the type of loss is dealt in a similar way[102].

In Article 14 of the civil code of the **Republic of Uzbekistan** caters that damages comprise of "*expenses",* of a person whose right has been restricted, has obtained or would have to receive in order to amend the restricted right, regarding to loss or damage to its property and benefits, which it is not obtained but would have been obtained, if there is not right had not been restricted. However, the requirement has been explained in detail, it is similar to the method taken by Article 74 of the CISG. Under the CISG, this requirement depends on the principle of the entire replacement for harm and saves the position, in which the party has had the responsibility of property presented. Although, this provision has worked out in a particular point and its access has been taken by the Article 74 of the CISG[103].

In such requirements, it could be mentioned that, in a legal adept, actual loss comprise of a number of unlike kinds of loss. Therefore, the construct of actual loss, used since its governance in Roman law, which is not deliberated as being constituted, in a legal sense, of varieties of loss. Until now, this dealing of actual loss, in the hypothesis of Civil Law, has been agreed upon. Since the pattern has been used in the CISG, is same as in Civil code of Uzbekistan and other civil law systems, the experience of handling this matter in the system of civil law should also

101 Schlechtriem, P., Commentary on the UN Conventions on the International Sale of Goods (CISG), Second Edition, 1998.

102 Ibid

103 Ibid

be considered. This categorization will explain clearly relied upon types or sorts of loss, which can be exercised. But in the criteria of CISG, the recommended classes of loss are not considered as legal forms. Added to this, the headings used to understand the kinds of loss can be conducted to some misunderstanding since those names are commonly used in some legal systems. In addition some of the conditions take many various significations. It is considering the external reference of the Convention and this kind of language should not be used, as far as possible[104].

2.5.1 Real Loss:-

The definition of real loss is that as; any deficiency has been happening in the assets of an injured party as they survived when they have terminated the contractor they have modified in his responsibilities which, for instance, *“occurs when a oblige, not having been paid by its obligations, must borrow money to meet its commitment”.* There is a huge diversity of kinds, and one of the real loss could be certified. However, it is not feasible to make an inclination of all kinds of loss, and can get real loss. Nevertheless, there is only the one way; they can be awarded compensation for real loss under article 74, if they have full filled the required criteria[105].

2.5.2 Loss of Profit:-

In Article 74 deals another classification of loss, which is loss of profit. The Loss of profit is a unlike type of classification, so it is deliberated differ then the real loss. Especially, the real loss usually means the reduction in the assets of an injured party at the end of the contract. On the other hand, it means by the loss of profit is that the loss of any increment in the assets which has been arises from the breach. In other terms, when the Contract had executed in a right way and the breach did not consecrate, the injured party would be delighted the increment of his assets[106].

[104] *Ibid*

[105]*Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 15th July 2011)*

[106] *Ibid*

It has been stated in the CISG, that the classification of loss, which are real loss and the loss of profit are modulated in the identical means. Hence, there is one confliction between them which has been meditating in the Convention's scheme and it should be directed. This confliction has been associated to the force of Article 44. Article 44, ignored the provisions of the both articles, which is in article 39 and article 43, if the vendee has an appropriate justification for the failure to pass on mandatory notice. After that the vendee might be diminishing the price or claim damages. Therefore, the loss of profit could not be required regarding the claim for damages[107].

2.5.3 The problems in Lost of Volume State:-

There is another type of loss which is called a "*lost volume",* situation, and in this division of the act will be analyzed the concern issues. This principle has been obtained evolutes in *American Judicial practice* and in a faculty writings. This kind of loss might be certainly arisen up in those situations, when they are dealing the International sales transaction. Under the Convention's legal regime, there is core significant to intellect of this construct and its aims. The construct of *"lost volume"* is a matter of wonderful deliberate. However, lost volume is the different form of loss, which is only, has given to those parties who are role play as venders in a contract[108].

In case of lost volume, a vender has been just fewer clients and caters goods to them. If anyone of the vendee has attempted the breach of contract, in case of taking over and declining the goods, the vender has right to resell the goods to another vendee. Under these circumstances, another one (second) sale could not be a substitute for the actual contract. There is a cause arisen up that the second vendee have been buying these goods from the vender, despite that the actual contract has been conducted. In this situation, the vendor has been *"lost volume*". According to his actual contract, entire sales have been decreased. Another one reason is also discussable which the matter of the second dealing is due to the

[107] *Ibid*

[108] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 15th July 2011)*

breach of contract has been forbade the vender to get extra profit from the actual contract[109].

The lost volume concept has not been approved on abstract ideas and economic bases. It has been stated, firstly, that the lost volume construct does not support the seller's duty to mitigate.

Secondly, it has also been discussed that the seller's hope from the profit of resale is also vulnerable[110]. It is based on this opinion the seller's assumptions should be checked simply while conducting a reasonable contract. A valid contact is the ground for legal safeguards a party's prospects[111].

Thus when the contract ends with the breaching buyer, the seller's wishes are legally safe under this contract. Though the law defends for the seller's profit under a valid contract for the sale of goods, it does not save the sellers anticipation of his market after the contract. The seller can resell the goods only if the original buyer denies supporting the deal. He can only hope after conducting a new contract with the second buyer. In giving the profit solution for volume sellers, the courts take effect from a date in the past to apply this expectation to the formation of the original contract, the right time when the assumptions are to the point regarding the contract goods. The lost volume seller's anticipation of the second sale is achieved until he conducts into the second contract. That time, the seller has a protective concern in the original contract and a dissimilar safe outlook in the second sale. The lost volume seller does not ask for his safety in both the dealings at the time of original sale. On the other hand, he puts forth an expectation in both contracts signed at dissimilar intervals[112].

The third vital discussion is that the compensation for damages due to the lost volume is more than required for the seller. It gives the seller much more than, what

[109] *Ibid*

[110] *Ibid*

[111] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[112] *Ibid*

he would have got through original contract. This view comes from the second controversy that the seller's anticipation is not protected in such a situation. Since the second point has not been valued, the *"over compensation"* spot cannot be approved as well. With respects to the Convention's place, it has been stated that it does not clearly handle on this matter. But, the suggestion is that under the CISG, loss of volume should be given importance. In lost volume positions the buyer would not be relieved unless the suffered party properly pays for his loss. The methodology for measuring damages specified in Article 75 (so-called "*concrete" calculation)* and 76 ("*abstract" calculation*) will not be capable to rejuvenate a party's expected benefit[113].

2.6 Methods of Reduction in Damages:-

There is a principle, is usually used in numerous legal schemes, which is the fixing contractual liability of the party in breach. The aim of this principle is as below;

"*The full compensation of the expectation and reliance interests would operate either as too strong a disincentive to the assumption of contractual obligation or to an undue rising of charges to cover such unlimited liability*"[114].

The CISG has got a similar access. It has been founded on the theme that the recovery of damages could not be limitless. The segment of this task would be analysed the way that the CISG caters to accomplish this aim. It is stressing the troubles, which relate to this matter. It has been expressed as well that there are various techniques for limitation of damages which is depending on the principle accomplished in a specific legal scheme. Moreover, under these circumstances, the UNIDROIT principle, regarding to this matter has comprised an illustration also: the principles holds a number of widely ways of limitation of damages[115].

[113] *Ibid*

[114] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 20th June 2011)*

[115] *Ibid*

2.7 Foresee ability:-

The principle of foresee ability is that the one of the system of limiting damages, and it has been obtained an extended covered in different legal schemes and international deeds. This principle has been a detailed story. It has been based in Roman law but later on it was accomplished in the Napoleon Code which has been followed by a numeral of legal systems. The Common Law has also acquired this formula[116]. It has been based in a **Hadley v Baxendale**[117]**.** The UNDROIT Principles comprise the kind of provision in Article 7.4.4. This formula has been established the core formula of limiting the damages in the CISG which is as below;

Damages are not possible to exceed the loss with the respect of the party in breach foresaw or should have to be foreseen at the moment of the ending of the contract. In the spot of the reality and issues of which he aware or should have to be acknowledged may conclusions of the breach of contract. The main objects of this portion of the task are to be analysed the access adopted by the CISG and equivalence it with others legal schemes[118].

2.8 Necessary Elements of Evaluation of Foresee ability:-

2.8.1 Knowledge:-

In English law, Knowledge is the core important component in assessing the foresee ability. However, at the closing of the contract, conclusion of the foresee ability relay upon the knowledge of the parties or the parties had been breached in this situation. However, under the CISG, the knowledge is concern able simply for those parties who are in breach and whose issue of knowledge. It has been adopted from the text of Article 74, there the foresee ability should have been affected in the spot of the reality and issue of which he then aware or should have to be acknowledged. It has been distinctly demonstrated that they have analysed the foresee ability on the

[116] *Ibid*

[117] *Hadley & Anor v Baxendale & Ors [1854] EWHC Exch J70 (23 February 1854)*

[118] *Ibid*

foundation of the party's knowledge. Therefore, the purpose of foreseeing ability is conducted depends on the party's knowledge[119].

In English law, knowledge has been divided into two forms: *imputed* knowledge and real knowledge. In *imputed* knowledge, any sensible person is owned the normal course of matters, it is disregarding that the party in breach has got owns in reality or not. In kind of real knowledge, it is meant by knowledge the party in breach has got some specific conditions which consist of outside the average course of matters.

In **Hadley v Baxendale**[120] both kinds of knowledge could be found. Under the CISG it is not constituted the both sections of the Hadley formula. This type of formula has been given two different sorts of knowledge. Therefore, regarding to the party's knowledge, they have stepped up subjective and objective criteria which are the reality and issues, and they have acknowledged or have to notice. However, this is called the general course of issues or could in case on specific conditions. Usually, the knowledge at the point of objective criteria, it should attribute to the party in breach if it could be objectively regarded that the kind of knowledge which is founded on the experience of the party equally a "merchant"[121].

With the respect of the Knowledge is founded on a subjective criteria and it is stated that the party in breach would be regarded as accepting acknowledged the reality and issues changing him to foresee may effects of the breach and however, as accepting foreseen them, if the other party to the contract has described his attention to this kind may conditions in due time[122].

Therefore, the question stands: is that the other party to the contract be the individual origin which must be getting into circumstance in the rating of the real knowledge of the breaching party? It has not been discussed that the other party to the contract is

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[119] *Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987).*

[120] *Hadley & Anor v Baxendale & Ors [1854] EWHC Exch J70 (23 February 1854)*

[121] *Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987).*

[122] *Judgment by OLG Hamm [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 23 March 1978 Appellate Court Hamm [ULIS precedent], case No. 2 U 30/77. Translated by Jarno Vanto; available at: http://cisgw3.law.pace.edu/cases/780323g1.html*

in the circumstances of a subjective criteria, most likely, the core reference of the data. Therefore, it is not the simply usable reference. It is stated rightly that the advance business patterns such as instrumentation, accounting methods and the broad communication of information provides more knowledge to both the parties regarding to the contract and should be acknowledged a wide and various realities than a possible breacher in the nineteenth century[123]. Hence, it is resolved regarding the party in breach could be regarded as accepting the reality and the issues a correct proportion has to be based and depending on the sources which are available. It is meant by we would require an approach the balance, which is saying that the each of the origin of data could be stated and to get participating of the data of the party's knowledge. Moreover, in Article 8, mechanism for decision of real knowledge of the party is catered. Especially, Article 8 (2) concerns to the arguments and behaviour of the party which is collectively with Article 8 (3) and it provides for the regulations of the version of the assertions and the behaviour of the party. Therefore, such kind of assertions and behaviour of the party in breach sometimes assist significant blinkers of the knowledge and it had been a time of the ending of the contract[124].

2.8.2 Conditions of the Contract:-

It was said that the foresee ability principle speculate the stipulations of the contract and, however, the priority has been ever apt to the express or implied aims of the parties which has been specified those stipulations. It is admittedly that the signification of the contract, combined with the knowledge of the party in breach, have been crucial components in the rating of foreseeing ability.

It has been also admittedly that there are reluctances regarding to the conclusion or priority of application of these factors. Under this circumstance, regarding the intents

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[123] *Murphey, A, G,Jr., Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley, 23 Wash. J. Int'l L. & Econ. (1989) 415-474. Available on http://www.cisg.law.pace.edu/cisg/biblio/murphey.html*

[124] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 20th June 2011)*

of the parties to the condition of the contract, priority should be given to the *"express or implied"*[125].

This argument has been founded in Article 6 of the CISG. It has been noted in these circumstances, Article 8 would be the philosophical theory of assuring the aims and construing the various condition of the contract. The submission of the argument could be brought the conditions; the arguments about the foresee ability formula meditate the conditions of the contract, which looks to bind the full construct of the foresee ability to the component of the contract. However, it would describe that the conditions of the contract has been meditating to the foresee ability. On the other hand, regarding to the conditions of the contract, which is assessing the foresee ability, few components are necessary. These are a utilization of knowledge and trade. These components could be or could be not stated in assessing contract. In the terms of party's real prevision and the capacity to foresee might not be stated assessing in the contract ever[126].

2.8.3 Utilization of Trade:-

It does look that in some cases, utilisation of trade has been used as an extra element for the rating of the foresee ability. Article 9 of the CISG, has included subjective and objective causes for the pertinence of utilization to the parties' legal relationships. It does look in those situations where the utilization of trade is concerned with evaluation of foresee ability, the pertinence of an objective or subjective criteria of foresee ability could be connected to the causes provided for in Article 9. However, under the circumstance, if a subjective cause is relevant, for instance, when the parties have been especially agreed to a specific utilization of trade or set up an exercise between them, or aware of utilization, then such a utilization or exercise would be probably to decide the real knowledge of a party in breach. The real knowledge has been demonstrated the *real foresight*[127]. Whereas

[125] *Ibid*

[126] *Ibid*

[127] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 20th June 2011)*

the reality that a party really aware of something which is not essentially meant by that the really foresaw the conclusion in the query. The real knowledge could be conducted to the set up of objective criteria, for instance, that a party is fully aware of the certain stipulations, and it was in a place to foresee the conclusions of the breach, but had not actually foresee them. If an objective background for the pertinence of utilization came into act as, probably this background would be *imputing* the knowledge of the party in breach. It has been catered that a party had not really own the knowledge, this imputed knowledge would be more conducted to decide on an *objective foresee ability*. The cause for this consequence is that it has been extremely unbelievable that a party would be really foreseen the conclusions if he had not really essential knowledge[128].

2.9 Whose Foresee ability?

In Article 74 of the CISG there is described that the party in breach who has been required to foresee or could be in a situation to foresee. In English law, the situation has been slightly dissimilar[129]. Especially, In **Hadley v. Baxendale**[130] with the regards of the loss, the both parties would be the reflected. Therefore, it does look that there is no any strong confliction would be developed regarding the application of the both formulas. The cause has been rising up that there are the issues of the foresee ability, with the respect of the breaching party. In virtually says that the plaintiff has a good knowledge about his business and its consequences, regardless the defendant[131].

2.10 Time of Application for Evaluation of Foresee ability:-

According to English law, usually the time of conducting the contract, is the time of application for evaluation of foreseeing ability. This formula has been established and

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[128] *Ibid*

[129] *Ibid*

[130] *Hadley & Anor v Baxendale & Ors [1854] EWHC Exch J70 (23 February 1854)*

[131] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 20th June 2011)*

turned up by broad modification. In CISG, the condition has been the same in Article 74 and mentioned as it is the time of the ending of the contract.

Usually, it does look in CISG, that this kind of matter has not any trouble at all. Only the issue which has been arisen up is that the time is a core crucial component in approaching foresee ability. The other crucial factors of foresee ability has been happening in the closing of the contract, which are, knowledge of the party in breach or such conditions of the case would analyse simply inside the restrictions of this specific period of time, which is that the time of the ending of the contract [132]. Hence, under this circumstance, the time is really significant. In this view, there has been rightly mentioned that the final moment of the contract, managing the consequences of the contract might be sure time period. It does look the right opinion to be rating foresee ability at the time when the contact has been enforced or insert into the legal effect. This form of access has been taken in some legal schemes regarding the consequence of the contract, which has been founded of its submission into legal effect[133].

It has been mentioned that as of the submission of the contract into legal effect is critical in the evaluations of foresee ability, and it needed to be extra caution to the criteria of legal schemes when the conducting the contracts into legal effect[134].

However, this kind of instruction has been valid only to those states whose essential criteria are different regarding the conducting of the contract and the principles for country enrolment of the contracts. It has been caveat under Article 96 of the CISG. The booking has been made under this article by the **Russian Federation** and they have catered for sure criteria regarding the kind of international economic transactions. At the last stage of the contract, the submission of the contract into legal effects is the vital time of conclusion of the party's foresees ability. Therefore,

[132] *Ibid*

[133] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[134] *Ibid*

after this time, there is no possibility for foresee ability could be rose, and it does not have any legal conclusion[135].

2.11 Objective and Subjective Criteria Regarding to Foresee ability:-

According to English law, there is an expression of the aims and subjective regarding the knowledge has been detected. It has been based a very necessary factor for the rating of the foresee ability. There are a few criteria regarding to check the foresee ability by owner. In **Hadley v Baxendale**[136], the first principle has been found in it, which is rendered to the criteria of aims, "*the defendant is liable for loss which could have been foresee"*. The second portion of the formula has been interpreted as a combination of two factors that the defendant is liable for loss which could be foreseen by a reasonable person regarding the similar knowledge of specific stipulations such as defendant had gotten. The same viewer has been described the reality that the factor of the aims has moved into the second portion of the principle. It is an illustration of two opinions regarding to this reality[137].

In a specific term, the first opinion is that there is no application of the principle of those conditions when the defendant has awareness about the specific consequences, but also where causes to have awareness about. Therefore, under the circumstances, the source has been produced to Article 74 of the CISG. It has been said rightly that the both criteria regarding to the foresee ability has been catered by the CISG: foresaw should have to be foreseen. There has been confliction between the provision in the CISG and English law regarding to this matter, and Article 74 purely splits up this kind of two criteria. However, under this principle, the two criteria do not move into each other. On the other hand, under the

[135] *Ibid*

[136] *Hadley & Anor v Baxendale & Ors [1854] EWHC Exch J70 (23 February 1854)*

[137] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

English law, it has been demonstrated that the both factors are submitted to the second division of the principle[138].

Hence, in Article 74, there has been purely partition of criteria and both of them have been evenly relevant. With the respect of regulating the foresee ability, it would be adequate to show that the party really foresaw the loss or to have the aims to foresee such kind of situation. However, there is no essential to demonstrate that the party in breach really has been foresaw the loss. Nevertheless, such kind of liability might be, it could be limited on the grounds of reasonable allocation of dangers under the contract. Especially, it might be assuming that the conditions of the contract have been adopted regarding the definite loss. It should not be dealt with the party's liability however, they have foreseen or to have aimed for foreseeable[139].

2.12 What should be Foreseen?

In Article 74, the foresee ability leads to that the loss as a possible circumstance of the breach of contract[140]. However, the sum of the loss should be foreseen. The most conducing observers have been accorded that Article 74 does not necessitate the foresee ability of the exact amount of the loss[141]. It has been stated that the loss has been a foreseeable that as the danger has really happened and it is necessarily the same as the danger which was able to foresee at the moment of the conclusion the contract. Therefore, the essential question arises up here, what solid elements the party in breach *"hard to foresee or ought to have foreseen to be liable for the loss"*?

However, the *Possibility of the loss* is the first element. This term related to the Article 74, which caters regarding that the loss should be foreseen a possible circumstance of the breach. In this situation, there is no question that the danger of

[138] Ibid

[139] Ibid

[140] Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987), See also Article 74.

[141] Schlechtriem, P., Commentary on the UN Conventions on the International Sale of Goods (CISG), Second Edition, 1998.

the loss is in affiliated with the kind of the possible loss. Hence, the second element is that, in which the party had been foreseen or should have to be foreseen, is the kind of the loss. It has been presented that foresee ability should also be connected to the third element[142]. The party of the breach had not been responsible for the entire point of the loss. If he could not have been appropriate foreseen or was not in the situation to foresee that such kind of point would be adopted from this kind of the loss. Therefore, the party in breach must not be responsible for the entire extent of the loss. Under the situation, as he cannot take reasonably foreseen or it was not in situation to foresee that the extent would be led from this kind of loss[143].

It is also stated regarding the rating of the potential point of the loss, in this situation the loss was reason or issues which contribute to the loss which having the adopted point in the question, which could be critical. Therefore, the arguments on these issues regarding to such kind of elements are essential elements that the party had been to foresee or should be foreseen to be responsible for the point of the loss in question[144].

2.13 Anticipatory Repudiation:-

Legal systems may have various disagreement points regarding the conclusions of the anticipatory repudiation. It is obviously carried on the draftsmen of the Convention going though in it carefully in this complicated sphere. In Article 72 the one rule is clear with the respect of the injured party possible nullify the contract in such kind of situations. However, this analytical view gives many questions which are unanswered. Would the injured party bound to elect between avoidance and the statement of the contract, if done so how quickly should be doing election? [145] Therefore, if there is no requirement to elect, possibly he can nullify the contract

[142] *Ibid*

[143] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[144] *Ibid*

54 Ziegel, J. S., The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives, The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender, Juris Publishing, (1984). Available on internet at: http://cisgw3.law.pace.edu/cisg/biblio/ziegel6.html

whenever he wants? Is he bound to mitigate his damages, as per requisite in Article 77, and does he mitigate at this point of the time regarding the buy of the exchanged goods, or make resale of goods, also the avoidance of unneeded post repudiation expenses in the situation of an injured purchaser and also the avoidance of unneeded post repudiation expenses? This sort of questions matter required an attention of, and it gives confliction among the courts and scholars in both ways of the Atlantic. It is not wondering that the draftsmen of the Convention were not eagerly to make a renewal which is arguable. It is obvious that the several of answers are based in Article 77, and some other most likely extracted from the other provisions in the Convention in Article 7(2) who guided and filled up this disruption[146].

2.14 Mitigation of Loss in issue of an Anticipatory Breach:-

It is stated that *“one challenging area for the prospective operation of the duty to mitigate”* has its pertinence regarding to an anticipatory breach[147]. In fact, the application of the measures to mitigate is compulsory affiliation with an anticipatory beach and it could be the measures are imposed on this situation?

Therefore, this enquiry demands some scrutiny. It has been said that the “*duty”* to mitigate should be imposed regarding the anticipatory breach of the contract[148]. Usually, such kind of consequences founded on few causes: The objective of Article 77 has to be promoting the mitigation of loss. In the conclusion, measures conducted at mitigating the loss have to be taken shortly if the party to the contract could be foreseen the risk of breach of the contract by the other party and of his possible loss[149].

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146 Ibid

147 Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html

148 Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987).

149 Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html

However, regarding to an underlying breach, especially, it was stated that if it is brighten that kind of a breach would happen, the related party could not be anticipated the contract date of execution. It was declared by the parties that the contract is nullified and will take measures to decrease the loss which has been developed of the breach by causing a cover buy and making a resell the goods[150]. Moreover, it is described that Articles 71 and 72 have been the provisions of the CISG and it regulates the acquittal of the parties in the "*anticipatory breach"* conditions. Therefore, It is significant to keep in head that the action regarding to these provisions are non compulsory role: it does not compel the aggrieved party to set aside his duties with respect to the other party and it would not be acted at "*substantial"* character of his duties. In the same terms, it has not been mandatory that the aggrieved party invalidate the contract with the regard of underlying breach would be taking place[151].

Some commentaries urged that regarding the matter of an anticipatory breach, especially in a matter of underlying breach, the process has been dictated in Article 71 and 72, which is being applied[152]. Moreover, it has been said that when the party does not adopt this process it does not set aside his execution and invalidate of the contract, and assert on the execution by the other party. However, under the circumstance, there would a danger for the party regarding the nonconformity in Article77 under CISG.

However, in a position of an anticipatory breach, if the aggrieved party would like to abide by Article 77, he should be adopted the process either in Article 71 and 72.

[150] *Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987).*

[151] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[152] *Bianca, C.M. & Bonell, M.J., Commentary on the international sales law: The 1980 Vienna Sale Convention. Giuffrè, Milan, (1987).*

Under this circumstance, if prescribed effect does not adopt, then can do afterwards mitigate, or he should be mitigated shortly as he could be foresee the breach[153].

Therefore, it has been noted that the duty to mitigate might be enforced in such issues to an anticipatory breach position, and there has been no necessity regarding to these matters. When before the contract date, if the one party denied to executing his duties and would like to repudiate the contract, under these circumstances, there are no binds the other party to abide by Article 72, regarding to invalidate or admit the repudiation. He is entirely ennobled to precede his executions and to require the execution from the other party. Hence, there are no requirements for his to mitigate, if he carries on to execute and would be anticipated the same from the other party. Thus, usually, when the execution of the party in breach does not happen on the contract date, later on, the injured party can do litigate for damages, without copping that his claim could be decreased. Therefore, it has been moreover proposed that this resolution should not be found forever in the case. There has been classified into the causes, where the duty to mitigate with the respect of an anticipatory breach, should be considered as essential and they don't abide a sanction of decrease in damages under Article 77 in CISG[154].

Now the question arises up, why essential should be there? Thus, regarding to this query, it could be deliberated that, whether these circumstances have been developed in some legal systems. With this regard, it does look that English law could be cooperative[155].

There is a common rule is that if one party repudiates the contract before to the execution date; the other party has got alternative choice. He may deny or admitting the repudiation and handling the contract as existing. However, under this circumstance, the contract would be reminded to live and there is no requirements happen to mitigate. On the other hand, he could admit the repudiation and deals the contract while the final stage. With this respect, he is powerful to litigate the

[153] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[154] *Ibid*

[155] *Ibid*

breaching party, immediately. This power would be issued to the mitigation rule. Nonetheless, regardless of this rule which is embodied substantial instituted; it has been two exclusions in it: (1) were merely it could not be workable; and (2) where it was conducted to entirely excessive consequences[156].

The first classification is regarding to those issues where the executions of the duties are founded on the actions between the parties. In case of executions of the duties of the innocent parties relies upon on that of the party in breach.

It might be rose up that the former would not be capable to continue his contribution of the dots without the second one's actions. Hence, in most of the cases, if action has been denied, then the party in breach can force the innocent party to bind his claim for damages. However, where it has been demonstrated that an execution has impossible in the absence of the action of the parties and the innocent party could be obligated to admit repudiation. Under this circumstance, his power to damages would be content to the *"duty"* to mitigate[157].

The second classification deals the position; where in case of *"legitimate interest*" on the character of the innocent party is to be demonstrated. When it has been demonstrated that a person has no legitimate concern with respect to the financial or on the other hand, to execute the contract, instead of claiming the damages, he should not be permitted to extra burden on the other party and there is no profit to him. When the party is not interested to impose a condition, so usually he cannot apply it: it could be stated that when the party is not interested to assert on a specific remedy, he should be permitted to assert on it[158].

In **White and Cater (Council) Ltd. v. McGregor**[159] a Company had terminated the contract with an expert. In the terms of the contract, the expert went overseas to collect the report with this respect. Thereafter, the consequences of the contract and prior to do any thing acted, the company repudiated the contract. The expert has got

[156] *Ibid*

[157] *Ibid*

[158] *Ibid*

[159] *White and Carter (Councils) Ltd v McGregor [1962] 2 AC 413, House of Lords*

intention to continue his character of obligations. It was held in this case by Lord Reid, where the one party repudiates the other party has an alternative choice. He can admit it, and litigate for damages for breach. It does not matter that the time for executions has come or not. However, regardless of this situation and the contract continue in complete force. It has been seen in most cases that the innocent party could not fulfil the contract without the other party's action. However, where possible, it has contended that it is reverse to public interest and to permit it. It simply permits the party to squeeze a huge payment, like in this case, the expert was developing a report and it was stated by the party Commission which is not essential. Under this circumstance, there is no essential that a contract would be affected in a sensible direction. It is hard to state that the party should be disadvantaged of their right to full fill and claim the contract amount[160].

At this point of the time, now the question arises up, what are the standards of defining the logical concerns? There is no distinguishable standards are formulated in English law. Even so, regarding to this certain issue, regulations is launched[161].

At First, in **White and Carter (Councils) Ltd. v. McGregor**[162] it does look that the reasonableness are the standard. It cannot be denied that the reasonableness are a core element. Therefore, the innocent party who has proved and acted unreasonably and it would not be answerable to demonstrate the absence of the legitimate interest. It is regarding to decide the presence or absence of the legitimate interest and it would be essential to discern between simply reasonable and entirely unreasonable processes. Secondly, it is not enough to ascertain just the interest of the innocent party regarding to launch the legitimate interest in it[163]. However, such kind of regulation has been demonstrated in **White and Carter (Councils) Ltd. v.**

[160] *Ibid*

[161] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[162] *White and Carter (Councils) Ltd v McGregor [1962] 2 AC 413, House of Lords*

[163] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

McGregor[164]. In this case, it has been provided that the breaching party not ought to be burdened with an extra burden.

Thirdly, it has been described that the legitimate interest is ought to set up on the stipulation that are regarding the damages which are sufficient remedy[165].

Thus, the idea of legitimate interest is a non considerable, instead of, it does look these regulations are undefined. Presently, the positions are regarding to the factors of cooperation and legitimate interests are dealt as exclusions to the general situations under Article 72 in CISG[166].

[164] *White and Carter (Councils) Ltd v McGregor [1962] 2 AC 413, House of Lords*

[165] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[166] *Ibid*

Chapter No. 3

OTHER RELEVANT ISSUES IN MITIGATION PROCEDURE IN GENERAL

3.1 OTHER RELEVANT ISSUES IN MITIGATION PROCEDURE IN GENERAL:-

3.2 Measures by Aggrieved Party:-

In **Oberster Gerichtshof**[167] an aggrieved party who is demanding the damages should have mitigated them. Under this situation, he could take the actions that a reasonable creditor performing with a bona fide[168]. When a contract has already been nullified, a notice by the aggrieved party has been served to the breaching party of a suggested steps to mitigate does not cancel the before avoidance[169].

In some situations, the Article 77 does not say that at what point of time the aggrieved should accept the measures to mitigate[170]. In **Oberster Gerichtshof**[171] held by that there is no bind an aggrieved party to mitigate in the duration before the contract has been avoided at this stage if each party might be having necessitated two other to perform. When an aggrieved party does not accept mitigation measures, therefore, under the situation he should do so within a reasonable moment[172]. In **Oberlandesgericht Düsseldorf**, **Germany held** by that the vendor's had been reasonably refused inside the circumstances of the fashion industry, so he made resale of goods to a third party later on[173]. In **Oberlandesgericht Hamburg**[174]

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[167] Judgement by Oberster Gerichtshof [Supreme Court] Austria 6 February 1996 ; No.10 Ob 518/95. Translated by Heidi Keschenat; Also available on internetat: http://www.cisg.law.pace.edu/cases/960206a3.html

[168] Ibid

[169] Judgement by LG Berlin [LG = Landgericht = District Court] Germany 15 September 1994 District Court Berlin (Shoes case) No. 52 S 247/94 Translated by Martin Eimer; Also available at: http://www.cisg.law.pace.edu/cases/940915g1.html

[170] Judegment by OLG Braunschweig [OLG = Oberlandesgericht = Provincial Court of Appeal] Germany 28 October 1999 Appellate Court Braunschweig (Frozen meat case) Case No. 2 U 27/99 Translated by Jarno Vanto; Aailable on internet at : http://cisgw3.law.pace.edu/cases/991028g1.html

[171] Judegment by OLG Braunschweig [OLG = Oberlandesgericht = Provincial Court of Appeal] Germany 28 October 1999 Appellate Court Braunschweig (Frozen meat case) Case No. 2 U 27/99 Translated by Jarno Vanto; Aailable on internet at : http://cisgw3.law.pace.edu/cases/991028g1.html

[172] Ibid
[173] Ibid

[174] Judgement by Oberlandesgericht Hamburg [Oberlandesgericht = OLG = Provincial Court of Appeal] : Docket No. 1 U 167/95. Translated by Linus Meyer; Also available on internet at: http://www.cisg.law.pace.edu/cases/970228g1.html

found that the vendee had bought the replace goods about two weeks later when the vendor has been stated that performance would not be done, even it has not been a failure to mitigate but the price in a market has gone up aggressively[175].

3.3 Diminution of Damages:-

It has been stated that the breaching party possibly can claim a lesson in the damages which are presented to the aggrieved party in the sum regarding the reasonable mitigation measure will less the loss to the aggrieved party. In **the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and industry**[176] held by that the aggrieved purchaser who is unable to mitigate, is defiantly entitled simply 50 percent of the conflict between the contract price and the price which has purchaser obtained it while it made to resell the nonconforming goods to its clients[177]. According an Arbitrator tribunal, parted the loss which is the reason by the vendee's bankruptcy to mitigate damages between the aggrieved vendee and the breaching purchaser, who have been asked for payment for half delivery[178].

As above mentioned case that they have been estimated the loss regardless specific reference to loss which could be nullified[179].

3.4 Notification of Mitigation:-

Article 77 does not define with regard to demand an aggrieved party to inform the other party of suggested actions to mitigate losses[180]. In **Landgericht Darmstadt** [181]

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[175] *Ibid*

[176] *Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 24 January 2000 Arbitration proceeding 54/1999; Also available on internet at http://www.cisg.law.pace.edu/cases/000124r1.html*

[177] *Ibid*

[178] *Judegment by Arbitration Court of the Chamber of Commerce and Industry of Budapest. Hungary 25 May 1999 Budapest Arbitration proceeding Vb 97142 ; Also available on internet at: http://cisgw3.law.pace.edu/cases/990525h1.html*

[179] *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods by available at http://www.uncitral.org/pdf/english/clout/digest2008/article077.pdf [Accessed on 18/06/2011]*

has been held that if a vendee has refused the compensation for the price of transforming a manual and at this point the vendee has unable to inform the vender, then it is signified to accept these actions, which is causing that as the vendee had supplied this kind of notice whereas the vendor could have been provided a present transformation[182].

3.5 Expenditure during Mitigation Process:-

If a party contracts measures to mitigate the loss then probably she would have some extra price. This price is to be regarded such as a loss endured as a conclusion of the breach of contract and it could be demanded under the Article 74. The price of mitigation measures, admitting those that who have not successfully mitigated the loss, they are going to be suffered by the party in breach[183]. Therefore, this is simply enforced to reasonable measures. The costs can be refunded although they have been contracted in vain. At last, under this situation they could be regarded reasonable[184]. However, there is a case involving that the court found that a purchaser could not attempt to mitigate the loss by making an order a missing version of VCR handbooks. But the purchaser did not inform the seller at any stage that who has got the VCR handbooks in the mandatory language[185].

3.6 Burdon of Proof:-

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180 *Ibid*

181 *Judgement by LG Darmstadt [LG = Landgericht = District Court]. Germany 9 May 2000. Docket No. 10 O 72/00. Translated by Ruth M. Janal; Also available on internet at: http://www.cisg.law.pace.edu/cases/000509g1.html [Accessed on 18/06/2011]*

182 *Ibid*

183 *Riznik, P., Article 77 CISG: Reasonableness of the Measures Undertaken to Mitigate the Loss, 10 November 2009: Mentors: Prof. Dr. Joseph Lookofsky, Faculty of Law, University of Copenhagen , Prof. Dr. Matjaž Tratnik, Faculty of Law, University of Maribor by available at: http://cisgw3.law.pace.edu/cisg/biblio/riznik.html*

184 *Ibid*

185 *Judgment by LG Darmstadt [LG = Landgericht = District Court] Germany 9 May 2000. Docket No. 10 O 72/00. Translated by Ruth M. Janal; Also available on internet at : http://www.cisg.law.pace.edu/cases/000509g1.html*

The significance of the matter of burden of proof should not be ignored. Though, the burden of proof has a procedure to follow, the direction it is distributed among the parties can make out the result of the case. Of course, this issue is signified in settling the limit of damages. Therefore, to do this a general principle of allotment of burden of proof needs to be done; CISG does not clearly explain this. The Convention's ignorance of this problem has raised varied ideas of legal scholars and thus leading to different understandings and implications of the CISG. That is to say that some commentators consider that the matter of burden of proof should be left to domestic law rather than the Convention[186]. Therefore, many cases liked this opinion. In a Swiss court, the burden of proof was based upon the rules of Private International Law of the forum rather than the CISG. In the **ICC Arbitral Award No. 6653**, the tribunal was agreed as well that the burden of proof was not regulated by the CISG[187].

Another case had disclosed another opinion. The Arbitral tribunal framed the matter of burden of proof depending upon general principles of law[188]. This access leads to a discussion on the position of the construct of *lex mercatoria* in making rules of International Commercial Transactions. Here, this method of framing rules for burden of proof is not supported[189].

It is discussed that the CISG regulates the matter of burden of proof[190]. According to many commentators Article 79 consists of a rule, which especially defines the burden

[186] *Ferrari, F., Burden of Proof under the CISG: Also available at Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 1-8* *http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html*

[187] *Judemeny by Court of Arbitration of the International Chamber of Commerce. ICC Arbitration Case No. 6653 of 26 March 1993. Translated by Kirstin Stadtländer; Also available on internet at:* *http://cisgw3.law.pace.edu/cases/936653i1.html*

[188] *Judgement by Court of Arbitration of the International Chamber of Commerce. ICC Arbitration Case No. 7645 of March 1995; Also available on internet at: http://www.cisg.law.pace.edu/cases/957645i1.html*

[189] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at:* *http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[190] *Ferrari, F., Burden of Proof under the CISG: Also available at Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 1-8* *http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html*

of proof[191]. Hence, it cannot be said that the CISG does not regulate this issue[192]. Many cases support this point. However, many courts said that though the CISG does not effectively conduct with burden of proof, but still it manages this matter [193] and should also be used for particular principle[194].

Hence, the allotment of burden of proof should be decided based on general principle, fundamental at the convention. The **Tribunale di Vigerano** has come up with such a principle[195]. That means, the party, which claims its assets, must prove the reality to support its claim[196]. Based on this principle, this court has, in a nutshell, framed another principle: if a party depends on a valid point, it should show the requirement of that point: when the party depends upon an exception, it should be shown the real requirements regarding to exception[197].

However, it is noted that these principles have already been formed in scholarly writings. Thus, based on these principles, the affected party should prove the non-performance and existence of damage to the other party.

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[191] Saidov, D., *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods,* Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html

[192] *Ferrari, F., Burden of Proof under the CISG: Also available at Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 1-8 http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html*

[193] *Judgement by Lugano, Cantone del Ticino, La seconda Camera civile del Tribunale d'appello. Switzerland 15 January 1998. Docket No. 12.97.00193. Translated by Charles Sant 'Elia; Also available on internet at: http://www.cisg.law.pace.edu/cases/980115s1.html*

[194] *Judgement by Bundesgericht [= BGer = Supreme Court] , 1. Zivilabteilung. Switzerland 28 October 1998. Docket No. 4C.179/1998/odi. Translated by Kirstin Stadtländer; Also available on internet : http://cisgw3.law.pace.edu/cases/981028s1.html*

[195] *Judgement by Tribunale [District Court] di Vigevano.* Italy 12 July 2000 *District Court* Vigevano. Case Name: *Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A. Docket No. 12 July 2000, n. 405; Also available on internet : http://www.cisg.law.pace.edu/cases/000712i3.html*

[196] Saidov, D., *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods,* Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html

[197] *Ferrari, F., Burden of Proof under the CISG: Also available at Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 1-8 http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html*

Added to this, the injured party needs to show the loss foreseeability of loss by the other party, the connection between the breach and the loss, there is need of certainty that the real amount of loss has endured. As for mitigation, the rule should be that the party who discussed, that the injured party has not adopted reasonable mitigation measures, they should bear the burden of proof[198].

3.7 Reasonableness:-

In Article 77, "*measure to mitigate loss must be reasonably*" in the considerations is pertained. The requirement of this kind of measures depends upon on the standard of *reasonableness.* Therefore, usually, it has been stated that the measure is reasonable *"if under the particular circumstances, it could be expected to be taken by a person acting in good faith",* or if it is *"adequate"* and forbidding regarding the loss[199]. Under the circumstances, the consideration had been ought to the party's acquirements and the place as a businessman, such as for instance, "*ingenuity, experience, and financial resources"*[200].

Therefore, if any one should also be accepted the account regarding the utilization of trade, the aggrieved party would not be duty-bound to acquire the measures. Under the circumstances, which are pertained *"excessive"* and means unreasonably are very costly and at the dangers. In Article 77, if the party abstains from this kind of measures, he would be regarded as not having followed under this[201].

Article 77 caters that the measure should be directed at mitigating of "*the loss, including loss of profit, resulting from the breach".* Therefore, it has been said that with the respect of adopting Article 74, this provision relates to unlikely forms of loss.

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[198] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[199] *Knapp, V., Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 559-567 Available on internet at http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb77.html*

[200] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html (accessed on 5th June 2011)*

[201] *Ibid*

It has been apprehended that the various forms of loss can produce to a very big diversity of position. Under the circumstance, the injured party should have mitigated after with a cautious consideration which is regarded to the solid situation, the standard of reasonableness, and a character of a loss. However, it does not look to make a number of every individual measure, which has been involved with the respect of this provision[202].

Therefore, mitigation itself has been produced the certain kinds of loss. On the other hand, sometimes mitigation might be the origin of various losses. Under this circumstance, an injured party has got a various expenses, such as cost of warehousing, amended costs or breakage cost etc. However, it has been discussed that Article 77 is very liberal and it has adequate to deal such kind of circumstances or position with the respect of necessitates to this type of mitigation of loss. It has been presented that it is possible to mitigate such form of loss[203].

3.8 Surety:-

Many legal systems have a demand as to surety of damages claimed. However, correspondence regarding to the demand could be found in the UNIDROIT Principles. This portion would be analysed the place of the CISG in regards to this matter. The CISG does not include the extract reference to surety. However, this part proposes that this form of restriction could be enforced in the cases which are modulated by the CISG. There has been several directions of how could be this rule be enforced and pointed out[204].

First, it could be enforced by the procedural law of the forum. It is stated that the "*problem of proof and certainty of loss is procedural matters which remains within the provision of national law, and procedural conceptions may still sever as covert*

[202] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at:* *http://www.cisg.law.pace.edu/cisg/biblio/saidov.html [accessed on 5th June 2011]*

[203] *Ibid*

[204] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at:* *http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

limitations on CISG consequential awards". It has been adopted from this statement that the procedural matters are outside the range of the CISG[205].

Secondly, it is the opinion that the surety is a regulated affair, but it is not expressly established in the Convention. However, Surety could be dealt as an adjective matter," *indirectly"* regulated by the CISG or could be a simply as a substantive regulation which is not expressly established in the Convention. Under the circumstances, one of the common aims had been found in the Convention. The matter relates to the Convention included a common principle regarding to the surety of damages could be discussable and might have further necessities of expansion[206]. If they don't found general principles, then the issue is going to be decided in accordance with the enforcement regulations of Private International Law (PIL). Therefore, it is core significant to that, when the surety of damages has been dealt as a procedural issue, regarding the rules of PIL arises beside the point, because regulation of PIL has been channelised at the *substantive,* instead of a procedural division of the legal regulation. Under the circumstances, the simply reasonable direction to adopt the enforcement of the procedural regulations of the forum, which is comprising the provision on surety[207].

Thirdly, it has been said that the matter of surety of damages is instantly concerned to the trouble of proof. The proof of the exact sum of damages might be impossible. However, the point of compensation could be decided on the foundation of simple prudence of a judge or an arbitrator. Therefore, the resolution of the troubles of surety could be deducted from a related provision of an applicable law[208].

Under the circumstances, the consequences might be adopted from either of the two concern access and it is mentioned above, for instance, where the effect of surety is considered as being beyond the range of the CISG or regulated but it is not

[205] Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html

[206] Ibid

[207] Ibid

[208] Ibid

expressly established in it, in addition from an application of the UNIDROIT Principle. Therefore, the correspondence might be adopted as well, where there have no basis for such prudence. It does look that the access is taken in the **ICC Arbitration Award 8611/HV/JK of 1997**[209]**.** It has been said that due to the arbitrator's deficiency to authentic documents relating the number of the machines for which customer has not paid, due to the non delivery of substitute parts. Under the circumstances, the arbitrator must evaluate the damages consorting to his own condemnation which is taken into condition the contexts. Fourthly, indications was risen up by one author regarding the rules of the issue of the surety which can be continued on the grounds of the UNIDROIT Principles[210]. Therefore, one of the aims of the principles is to represent or append the international uniform law instruments such as the CISG. They could be utilized to append those provisions, which are in the Convention's range, but it has not been expressly established. It is suggested by the author that the UNIDROIT Principles be effected as an *"element of the 'general principles' fundamental the CISG*".

Therefore, with the respect of, the issue of surety decreasing inside the Convention's range, it is said by the commentator that the UNIDROIT Principles article 7.4.3 complements CISG article 74 by stressing that the presence and extent danger of the harm to be compensated must be based with a reasonable degree of certainty[211]. Under the circumstances, if the level of the surety could be attained, the court has got prudence powers to evaluate the damages[212]. It is present that the discussion of the surety acts an answerable regarding to the contribute to managing the Convention's international acts and participation to uniformity in its application. Therefore, there is one discussion going on regarding the issue whether or not

[209] *Judgement by Court of Arbitration of the International Chamber of Commerce. ICC Arbitration Case No. 8611/HV/JK of 23 January 1997.Translated by Beate Satory; Also available on internet at:http://cisgw3.law.pace.edu/cases/978611i1.html [* Accessed on 16/07/2011]

[210] *Purpose of the Principles; UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010 by available at : http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf*

[211] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[212] *Purpose of the Principles, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010 by available at : http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf*

regulated by the Convention and whether UNIDROIT Principles could be considered as a component of the general principles, fundamental the Convention[213]. In **Delchi Carrier, S.p.A. v. Rotorex Corporation**,[214] the court has discovered the some points that the damages for loss of profit must be shown with a reasonably surety. However, such kind of discovering was founded on surety and it has been set up in Common Law. Hence, it has been stated that the conclusion was observed in two types. First, there has not been included that the ground for the conclusion which is used in common law criteria. Secondly, surety was dealt to be procedural regulation and its application should not have overstepped the procedural bounds. It has been stated below regarding to this case;

"There is a distinction between a court determining that the evidence is unreliable or uncertain and a court not allowing any evidence of a type of loss because the law of the jurisdiction refuses to allow damages for that type of loss as a matter of law"[215]*.*

However, with the respect of the surety rule, if it has been enforced in the CISG case, it should not be forbidden the injured party regarding the arrogating the loss and it could be lawfully arrogating under the Convention. Although, that is the method, it would enforce under the specific legal system, the court has no power to limit the Convention's lawful regime and legalize the rights, which has been set by the CISG. Further, it has been said that the *"international character"* of the Convention and its necessities to boost up uniformity in its covering should forbid the courts from enforcing this criterion in this direction[216].

Therefore, the criteria of the surety could be and sometimes enforced on the parties in the CISG cases, despite that the Convention does not simply cater for it. This task

[213] *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, 1994 – UNIDROIT by available at : http://www.jus.uio.no/lm/unidroit.contract.principles.1994/plain.txt [Accessed on 24/07/2011]*

[214] Delchi Carrier, S.p.A. v. Rotorex Corporation *United States 6 December [1995]*

*215 Schneider,E.C., Consequential Damages in the International Sale of Goods: Analysis of Two Decisions. Available at **:** http://www.cisg.law.pace.edu/cisg/wais/db/articles/schnedr2.html*

[216] United Conventions on Contacts for the International Sale of Goods (1980)[CISG], copy right by PACE Law School. Also available at : http://www.cisg.law.pace.edu/cisg/text/treaty.html

has been proposed various directions, by the demand for surety and it is an assorted kind which could be enforced[217].

3.9 Defects:-

According to the CISG, the defect does not grind on liability, nor does it give any solution regarding to that. Thus, the right to recover the loss under the CISG not related to *“proof or even presumption”* of the seller’s *“culpable breach”*. The amount payable is decided based upon the non performance of the contract and the CISG. Hence, this ideology cannot fit according to the Convention. However, it has been concluded that the liability under the CISG cannot be considered as perfectly rigid as the party can be excused from paying any compensation under Article 79[218].

3.10 Questions Surrounding Article 77 CISG:-

3.10.1 Application of Other Remedies:-

The extremely question arises up now, therefore, whether the duty to mitigate could be enforced to remedies other than damages, specifically regarding to the right to specific performance and it has been included step in the cost, and the right to price decrease also. The scope of this argument could be based on the drafting history of Article77 CISG. At the 1980 Vienna Conference, *Jhon Honnold* suggested a statement of what is the forthwith Article 77 CISG, according to which it must have read:

'If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have mitigated, or a corresponding modification or adjustment of any other remedy'[219]

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[217] *Saidov, D., Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, Dec 2001. Available on official website of PACE Law School at: http://www.cisg.law.pace.edu/cisg/biblio/saidov.html*

[218] *Ibid*

[219] *Schwenzer, I., and Manner, S., The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies, Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (2008) 470-488 available at : http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-manner.html [Accessed on 16/06/2011]*

However, under the circumstance, it is crystallized that there are no limitations of damages regarding the mitigation rule, but could be enforced to the other remedies. This suggestion has been refused on the base of the phrasing which is being 'too general and hence dangerous'[220]. Though, the legislative history, phrasing and the systematic position of Article 77 CISG is in fact a very solid controversy oppose the application of the mitigation rule beyond the sector of the damage. Under the conclusion of the present version, there are few questions arise here and in some situation it is not in harmony with other opinions that are bona fide to regarding the international commerce.[221]

As regards, if the sales contract wants the vendor to manufacture and deliver customized goods to the vendee. The vendor before going to commence the production, the Vendee repudiates the contract. At this point of time, the question arises; can the vendor knowingly continue with production and compel the performance of the contract on the Vendee by demanding the buy cost of the accorded date of performance? Therefore, a view of national laws demonstrates that this question could simply be replied in the negative way, however, the CISG does not especially; allow the vendee a right to cease the contract[222].

3.10.2 Manage with the Breaching Party:-

In Article 77 CISG, there is last problem is rising which is able to be discussed at this point of time: could the duty to mitigate demand the aggrieved party to bang a cover with the breaching party, particularly regarding in this situation when the parties are going to contract in market situations?

Therefore, if the vendee repudiates the contract, but simultaneously, he is agreeing to purchase the same goods from the vendor at a low cost still the market present

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[220] *LEGISLATIVE HISTORY1980 Vienna Diplomatic Conference: Summary Records of Meetings of the First Committee 30th meeting. Also available at: http://www.cisg.law.pace.edu/cisg/text/link77.html*

[221] *Schwenzer, I., and Manner, S., The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies, Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (2008) 470-488 available at : http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-manner.html [Accessed on 16/06/2011]*

[222] *Ibid*

price. Under this situation, a solid controversy could be held regarding the mitigation rule. However, usually, 'requires' the vendor resolve the essential deal sale; it is not with the third party at present market situations, instead with the Vendee it.

The philosophy of mitigation would work in a way as to the seller's right to heal under the Article 37 CISG and its right to remedy faults falling in Article 48 CISG. When the seller does not have the offer of the breaching party, its damages are to be decreased in the sum of costs which could not be taken while they are making a deal with the breaching party[223].

When the mitigation principle requires covering with the breaching party, the similar a *fortiori* grasping the criticism in this situation, where rigid bond to the contract would be followed to one-sided burdensome outcomes[224]. Especially, if unforeseen has eventualities can be possible to have performance too burdensome for one party. Therefore, regardless of this query which has risen up whether the party has burdened with the related alter of situation can possibly be excused from its obligation to give damages under Article 79 CISG. The duty to mitigate is possible to demand the other party to make a renegotiate the contract and its conditions. Hence, it has been presented that same kind of outcomes to those Article 6.2.3 (1) UNIDROIT Principles and Article 6:111 (2) PECL, which are entitled the deprived party to make a request renegotiations, can be possible as well to accomplish in Article 77 CISG[225].

[223] *Judgement by Tribunal Supremo [Supreme Court]. Spain 28 January 2000;Case No. 454/2000.Translated by Alexandro Osuna González;Also available on internet at: http://cisgw3.law.pace.edu/cases/000128s4.html#cx*

[224] Schwenzer, I., and Manner, S., The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies, Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (2008) 470-488 available at : http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-manner.html [Accessed on 16/06/2011]

[225] *UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010: Article 5.1.3 (Co-operation between the parties); Also available at : http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf*

Chapter No. 4

CONCLUSION & BIBLIOGRAPHY

Conclusion:-

In the above written dissertation the author has observed that the mitigation of loss is the most important remedy is available in CISG for the breach of contract. Contract of International Sales of Goods (1980) [CISG] is a new law and it is acceptable to both Civil Law and Common Law states. The CISG gives protection not merely to the aggrieved party but also protects the party in breach from unreasonable losses in the event of breach of contract. There is a doctrine used in many legal schemes which is the defining liability of the party in breach. In addition the CISG has got the similar approach. The above analysis deliberates how damages are measured if the parties breach their responsibilities under a contract formulated by the Convention. The United States is a party to the Convention. American treaty makers of International Sales Contract require to deliberate not simply Conventional measures damages but in addition how the other spheres of the Law now operated by the Convention and its do affect their customers.

It has also been kept an eye on that the Convention is not applicable to United States of America's sales of contract, when International Private Rules demonstrated the direction to the application of the domestic law. If the case is regarded to the contract which is under the Convention then Federal courts in the United States had no prospect to consider the issue. The United Nations had not formulated an international Court to hear any dispute regarding the Convention provisions. Therefore there are no any indications from the Convention was already to handle these kind of issues. Hence, disputed cases regarding the Convention would be handled by the National Courts.

In the end, the present author has also observed that the above mentioned comparative analysis between Article 77 CISG and Article 7.4.8 UNIDROIT Principles which is regarding the Mitigation of harm shows numerous conflicts in respect of drafting and interpretation of these articles. Therefore, in particular Article 77 CISG shows in favour of the aggrieved party. On the other hand it is detected that the Article 7.4.8 UNIDROIT Principles talk about the concern of both the non- performing

and the aggrieved party. However, it has been noted that the despite of these conflicts which has been mentioned in the above paragraph the Article 7.4.8 UNIDROIT Principles and its following comments put at ease the version of Art.77 CISG, and it sustains an obligation which is identified with an aggrieved party in respect of decrees the damages reasoned by the non-performing party when it is reasonable to do so in the defined situation.

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